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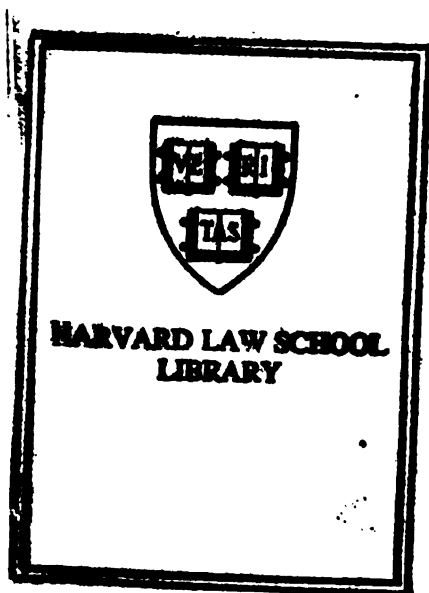
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REPORTS

OF

SELECTED CIVIL AND CRIMINAL CASES

DECIDED IN

**THE COURT OF APPEALS
OF KENTUCKY.**

**BY JAMES P. METCALFE,
REPORTER OF THE DECISIONS OF THE COURT OF APPEALS.**

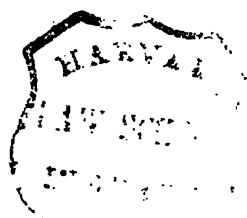
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PRINTED AT THE COMMONWEALTH OFFICE.
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1864.**

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Entered according to the Act of Congress, in the year 1864,
BY JAMES P. METCALFE,
In the office of the Clerk of the District Court of the United States for the District
of Kentucky, in the Eighth Circuit.

**JUDGES OF THE CIRCUIT COURTS IN KENTUCKY,
IN COMMISSION AT THE PUBLICATION OF THIS VOLUME.**

- 1st District—Hon. CHARLES S. MARSHALL.
2d District—Hon. R. T. PETREE.
3d District—Hon. JAMES STUART.
4th District—Hon. ASHER W. GRAHAM.
5th District—Hon. JOHN E. NEWMAN.
6th District—Hon. F. T. FOX.
7th District—Hon. P. B. MUIR.
8th District—Hon. GEORGE C. DRANE.
9th District—Hon. JOSEPH DONIPHAN.
10th District—Hon. L. W. ANDREWS.
11th District—Hon. RICHARD APPERSON.
12th District—Hon. GRANVILLE PEARL.
13th District—Hon. W. C. GOODLOE.
14th District—Hon. W. P. FOWLER.
15th District—Hon. T. T. ALEXANDER.
4th District Equity and Criminal Court—Hon. JOHN W.
RITTER, Chancellor.
Louisville Chancery Court—Hon. HENRY PIRTLE, Chan-
cellor.

JUDGES AND OFFICERS OF THE COURT OF APPEALS.

The term of Chief Justice STITES expired at the August election, 1862, when Hon. R. K. WILLIAMS was elected to fill the vacancy. The Court, since that period, has been composed of the following members :

HON. ALVIN DUVALL,	CHIEF JUSTICE.
HON. JOSHUA F. BULLITT,	} JUDGES.
HON. B. J. PETERS,	
HON. R. K. WILLIAMS,	
LESLIE COMBS,	CLERK.
JAMES P. METCALFE,	REPORTER.

**PRINCIPAL OFFICERS OF THE STATE OF KENTUCKY,
AT THE TIME OF THE PUBLICATION OF THIS VOLUME.**

THOS. E. BRAMLETTE, GOVERNOR.
E. L. VANWINKLE, SECRETARY OF STATE.
JOHN M. HARLAN, ATTORNEY GENERAL.
W. T. SAMUELS, AUDITOR OF PUBLIC ACCOUNTS.
JAMES H. GARRARD, TREASURER.
JAMES A. DAWSON, REGISTER OF THE LAND OFFICE.
DANIEL STEVENSON, SUPERINTENDENT OF PUBLIC INSTRUCTION.

DEDICATION.

In completing this volume, the Reporter recurs with pride and pleasure to the fact that the Court of Appeals of Kentucky has always been renowned for the eminence of its jurists, and for its sound and able expositions of the law and the constitution. Its contributions to the jurisprudence of the country are contained in many volumes of reported cases, besides a multitude of manuscript opinions.

The people of the State have ever been accustomed to regard an independent and enlightened judiciary as a chief bulwark of constitutional liberty. Their traditional policy rendered historic the earlier struggles and triumphs of the Court of Appeals in the maintenance of this vital principle. May we preserve for ourselves, and for coming generations, the priceless heritage.

To the members of the Court now in office the Reporter respectfully inscribes the present volume—made up from their labors—as a testimonial of their ability, their fidelity to principle, and their patient industry and research, so fully illustrated in its pages.

RULES ADOPTED OCTOBER 9, 1863.

It is ordered that the following rules of practice in this court shall be observed during and after its next term:—

1. During the term at which a case is decided, a petition for a re-hearing may be filed within fifteen juridical days, not including days of recess, from the time of the decision, and not afterward; and, during such term, the decision shall become final, and the mandate shall issue, after the expiration of that period and not before, unless in delay case, or cases involving no difficult question of law or fact, the court shall otherwise specially direct.

2. Where a case is decided within fifteen juridical days, not including days of recess, before the expiration of the term, a petition for a re-hearing, with an endorsement thereon by one of the appellate judges ordering it to be filed, and that the decision or mandate therein mentioned shall be suspended until the tenth day of the next term, may be filed within fifteen days after the adjournment of the court, and not afterward, nor otherwise. If a petition shall be thus endorsed and filed the mandate shall be suspended till the tenth day of the next term; otherwise the decision shall become final, and the mandate shall issue, after the expiration of fifteen days succeeding the adjournment of the court, and not before.

DECISIONS
OF
THE COURT OF APPEALS
OF KENTUCKY.



SUMMER TERM, 1862.

CASE 1—INDICTMENT—JUNE 7.

Moody vs. Commonwealth.

APPEAL FROM THE CAMPBELL CIRCUIT COURT.

1. There is no provision of the Constitution of Kentucky, which indicates an intention to deprive the legislature of the power which it possessed, without constitutional grant, to punish a person for challenging, in this State, any one, whether a citizen or alien.

2. The act of the legislature to punish dueling is not limited to duels between citizens of this State.

3. An indictment against one for challenging another to fight in single combat with deadly weapons, is sufficient, although it does not aver that the paper therein copied and averred to have been meant and intended by the former as a challenge, was so understood by the parties. Such an averment was unnecessary. (3 *Dana*, 418.)

4. The statements of a witness as to the rules of the *code duello*, in relation to sending and accepting challenges, upon an indictment against a party for sending a challenge, are inadmissible.

5. Facts stated in the opinion, which the court pronounce sufficient foundation for admitting as evidence, in a prosecution for sending a challenge to fight a duel, letters of persons alleged to have acted as the seconds of the parties; also to excuse the production of the original letters between the principals and their seconds, and to allow the Commonwealth to prove printed copies of the correspondence between them.

JAMES R. HALLAM, for appellant, cited *Stanton's Rev. Stat.*, 404; *Criminal Code of Practice*, secs. 121 and 273; *Fible vs. Caplinger*, 13 *B. Mon.*, 466; *Walston vs. Commonwealth*, 16 *Ib.*, 34; *Comely vs. Same*, 17 *Ib.*, 409; *Goddard vs. Maddock*, *Ms. Opin.*

Moody vs. Commonwealth.

Dec., 1854; *Tomlin vs. Commonwealth*, *Ms. Opin.*, *Dec.*, 1855; *Constitution of Kentucky*, art. 8, sec. 20; *Commonwealth vs. Hart*, 6 *J. J. Marshall*, 120; *Same vs. Pope*, 3 *Dana*, 418; *Same vs. Rowan*, 3 *Dana*, 396; *Same vs. Tibbs*, 1 *Dana*, 524; 1 *Greenleaf on Evidence*, secs. 82 and 88.

A. J. JAMES, Attorney General, for Commonwealth, cited 1 *Stanton's Rev. Stat.*, 404; *Code of Practice*, sec. 18; 1 *Arch. Cr. Prac. and Pl.*, 928, 929; 3 *Dana* 418; 6 *J. J. Mar.* 119; *Wharton's Amer. Crim. Law*, secs. 608, 657.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Moody was indicted for challenging Horace Heffren to fight in single combat, with deadly weapons. There was a verdict against him for a fine of \$500; a motion in arrest of judgment, and for a new trial, were overruled, and a judgment was rendered upon the verdict, from which he appealed.

1. It is contended that the indictment is defective because it does not aver that either Moody or Heffren was a citizen of this State.

First. It is urged that the legislature was deprived of the power to punish a person for challenging any one not a citizen of this State by the following provision of the Constitution: "Any person who shall, after the adoption of this constitution, either directly or indirectly, give, accept, or knowingly carry a challenge to any person or persons to fight in single combat, with a citizen of this State, with any deadly weapon, either in or out of the State, shall be deprived of the right to hold any office of honor or profit in this Commonwealth, and shall be punished otherwise in such manner as the General Assembly may prescribe by law." (*Art. 8, sec. 20.*)

We perceive nothing in that clause indicating an intention to deprive the legislature of the power which it possessed, without constitutional grant, to punish a person for challenging, in this State, any one, whether a citizen or alien.

Secondly. It is contended that the legislature intended only to punish dueling between citizens of this State—1. Because, as alleged, the constitutional provisions are clearly limited to duels by citizens of this State with citizens of this

State. 2. Because the act against dueling prescribes not only the penalty of fine or imprisonment, but also those of forfeiture of office, and disqualification to hold office or exercise the right of suffrage within this State, for seven years after conviction.

(1). It is clear that the constitutional provision, above cited, is not limited to duels between citizens of this State. It does not prohibit a citizen from giving a challenge to, or accepting a challenge from, one who is not a citizen; but it applies to every person, whether a citizen or not, who gives a challenge to or accepts one from a citizen; and provides that such person, though not then a citizen, shall be deprived of the right to hold any office of honor or profit in this Commonwealth; and leaves the legislature free to prescribe the penalty in all other cases.

(2.) The first and second sections of the act against dueling apply to "whoever shall challenge another," and "whoever shall accept any such challenge." The argument, that the provisions of these sections, prescribing the penalty of fine and imprisonment, or both, should be limited, by construction, to duels between citizens of this State, because the fourth section disfranchises persons convicted under the first and second sections, is deprived of most of its force by the fact already shown, that the Constitution provides for the disfranchisement of duelists, though they may not be citizens at the time of the offense. It might be urged, with equal force, that the provisions of the Revised Statutes concerning larceny, and several other felonies, should be limited, by construction, to citizens of this State, because persons convicted of those crimes are disfranchised for a certain period. (*Revised Statutes, chap. 32, art. 12, sec. 15.*)

2. It is contended that the indictment is defective, because it does not aver that the paper therein copied, and averred to have been meant and intended by Moody as a challenge, was so understood by the parties. Such an averment was unnecessary.

This indictment contained the same averments as that in the case of the *Commonwealth vs. Pope*, which was pronounced sufficient. (3 *Dana*, 418.)

3. The appellant asked a witness to "state the rule of the *code duello*, in relation to sending and accepting challenges," an objection to which was sustained by the court, and it is contended that this was erroneous.

We have no judicial knowledge concerning said code. But we must presume that it is a collection of written rules of some kind—such being the import of the word code. Whether or not those rules, if properly proved, would have been admissible, we cannot decide, because the record does not show what they are. If admissible, the code itself should have been produced. The witness' statements as to its rules were properly excluded.

4. The Commonwealth, notwithstanding objections by the appellant, was allowed to prove printed copies of the correspondence between Moody and Heffren, and their alleged seconds. It is contended that this was erroneous—1st. Because it was not proved that the alleged seconds were such. 2. Because the original letters should have been produced.

(1.) The witness, Thomas L. Jones, testified that he saw the parties upon the field, prepared for combat. G. P. Buell and J. C. Walker were there professing to be, and acting as, their seconds. The witness and Terrill offered their mediation to Walker and Buell, which was accepted, and resulted in an adjustment of the difficulty. In our opinion those facts furnished a sufficient foundation for admitting the letters of Buell and Walker.

(2.) It appeared that the letters, when last seen, were in the possession of Major Terrill, who was copying them for publication; that he was a resident of Newport, where the cause was tried, and had been there during that term of the court, but at the time of the trial "was absent in the army of the United States in Kentucky." The trial took place in February, 1862. In view of the civil war then existing, and in which the United States forces were engaged, our opinion is that the Commonwealth was not bound to make any effort to compel

Heffren vs. Commonwealth.

Major Terrill to produce the original letters, even if, under ordinary circumstances, that would have been necessary—a point upon which we need not express an opinion.

The judgment is affirmed.

CASE 2—INDICTMENT—JUNE 7.

Heffren vs. Commonwealth.

APPEAL FROM THE CAMPBELL CIRCUIT COURT.

See the opinion for a case in which the facts stated in an indictment for accepting a challenge to fight in single combat with deadly weapons, were held sufficient.

JAMES R. HALLAM, for appellant, cited *Crim. Code*, secs. 121, 349, 273; 13 *B. Mon.*, 466; *Goddard vs. Maddock*, *Mss. Opin.* Dec. 1854; *Tomlin vs. Commonwealth*, *Mss. Opin.*, Dec. 1855; 16 *B. Mon.*, 34; 17 *B. Mon.*, 409; *Constitution of Kentucky*, art. 8, sec. 20; 3 *Dana*, 419; 6 *J. J. Marshall*, 119; 1 *Dana*, 524; 1 *Greenleaf Ev.*, secs. 82, 89; 3 *Dana*, 396.

A. J. JAMES, Attorney General, for Commonwealth.

JUDGE BULLITT, DELIVERED THE OPINION OF THE COURT:

Heffren was indicted for accepting a challenge to fight G. C. Moody in single combat with deadly weapons. There was a verdict against him for a fine of \$250; a motion in arrest of judgment and for a new trial were overruled, and a judgment was rendered upon the verdict, from which he appealed.

The indictment contains a copy of a note from Moody to Heffren, which is averred to be a challenge to fight a duel in single combat with deadly weapons, and which refers to G. P. Buell as Moody's friend, who will receive and answer all communications from Heffren; and avers that Heffren accept-

Heffren vs. Commonwealth.

ed said "challenge in the words following, to-wit:—" and then sets forth what purports to be a copy of a note from Heffren to Moody, and of a note from J. C. Walker to G. P. Buell. .

It is contended upon the authority of *the Commonwealth vs. Rowan*, 3 *Dana*, 395, that the indictment is defective because it fails to aver that Moody intended his note as a challenge, or that Heffren accepted it as such. If the indictment had only set forth the note from Moody to Heffren, and that from Heffren to Moody, the objection would have been valid, as an acceptance of a challenge is not the necessary import of those notes. But the note from Walker to Buell designates the time at which the parties should meet, the weapons to be used, the mode of determining the choice of ground and the right to give the words of command, the distance at which the parties should stand from each other, and the manner in which they should take positions, fire and cease firing. That note shows clearly that Heffren accepted Moody's note as a challenge to fight in single combat with deadly weapons. Hence, no averment that he intended to accept it as such was necessary. The fact that said note was signed by Walker and addressed to Buell is immaterial, as it is set forth as part of the words by which Heffren is averred to have accepted the challenge.

The other points relied upon for a reversal were pronounced insufficient in our opinion in the case of *Moody vs. Commonwealth*, decided at this term.

The judgment is affirmed.

Lee, Ivy & Co. vs. Buford.

CASE 3——JUNE 5.

Lee, Ivy & Co. vs. Buford.

APPEAL FROM FRANKLIN CIRCUIT COURT.

Under the statute of Louisiana a protest by a notary after a presentment by his deputy is authorized; and a certificate of protest by the notary, although it shows that payment of the bill was demanded by his deputy, is valid. The statute quoted and construed.

T. N. LINDSEY, and HUNT & BECK, for appellants.

G. W. CRADDOCK, for appellee.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The appellants sued the appellee as drawer of a bill of exchange payable in New Orleans.

Upon the trial the appellants read a statute adopted by the legislature of Louisiana containing these provisions: "That it shall be lawful for each and every notary public in New Orleans to appoint one or more deputies to assist him in the making of protests and delivery of notices of protests of bills of exchange and promissory notes: *Provided*, that each notary shall be personally responsible for the acts of each deputy employed by him. Each deputy shall take an oath, faithfully to perform his duties as such. The certificate of notice of protest shall state, by whom made or served." The appellants also read two depositions, which we need not notice, and offered to read a certificate of the protest of said bill, which, on appellee's motion, was excluded.

The only question presented here is, whether or not the court below erred in excluding said certificate. The only objection to it, which has been urged before us, is, that it was made by a notary, whilst, as it shows, payment of the bill was demanded by his deputy.

The cases of *McLane vs. Fitch*, 4 B. M., 600, and *Bank of Ky. vs. Gary*, 6 B. M., 629, are not decisive of this question, because, if for no other reason, there was no proof in those cases of any statute in Louisiana upon the subject under consideration.

Lee, Ivy & Co. vs. Buford.

This case is governed by the statute above cited. We have seen no decision upon that statute by a court in Louisiana.

But in the cases of *Carter vs. Union Bank*, 7 *Humphreys*, 548, and *Chew vs. Read & Co.*, 11 *Smedes & Mar.*, 188, it was decided that said statute, or one containing the same provisions, authorized a protest by a notary, after a presentment by his deputy, and that a certificate of protest like the one in this case was valid. In our opinion, those decisions are right.

The protest does not, as contended, contain merely *hearsay* evidence, that the bill was presented. It states that the notary, by his deputy, presented the bill.

In contemplation of law, the act of the deputy was the act of the notary, and the protest furnished, therefore, the same evidence of a presentment as if it had stated that the notary in person presented the bill.

The reasons urged to prove that, under said statute, a notary cannot base a certificate of protest upon a presentment by his deputy, apply with equal force, to prove that he cannot base a certificate of notice of protest, upon a service of notice by his deputy. The statute however, declares, that "the certificate of notice of protest shall state by whom [the notice was] made or served;" from which it seems clearly inferable that the legislature contemplated that the notice might be served by one, and certified by another.

The judgment is *reversed*, and the cause remanded for a new trial, and other proceedings not inconsistent herewith.

CASE 4—PETITION ORDINARY—JUNE 6.

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Phoenix Insurance Company vs. Lawrence et al.

APPEAL FROM KENTON CIRCUIT COURT.

1. Where a condition of a policy of insurance requires the insured to deliver an account of their loss, with their oath or affirmation declaring the account to be true and just, &c., the affidavit of the insured is admissible to prove a compliance with such condition, but for no other purpose, and the court should so inform the jury.

2. If a policy of insurance has ceased to have any effect, by reason of the insured having kept prohibited articles in the house, a promise by the insurer's agent, having authority to adjust and pay losses, with knowledge that the prohibited articles were kept in the house at the time of the fire, will not bind his principal.

3. A firm obtained insurance upon a storehouse and the stock of goods therein for a separate sum. The interest of the insured in the house was incorrectly described in the policy as belonging to the firm, whereas it was the property of one of its members. In a suit brought to recover for the loss of the goods—*Held*, in the absence of proof that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods, that this does not vitiate the insurance on the goods.

4. The constructive possession of the sheriff by virtue of the levy of an execution upon goods which have been insured, where the insured retains the actual possession, does not vitiate the policy. Otherwise where a conveyance is made which terminates the interest of the insured in the goods.

5. Although a policy of insurance contains a clause prohibiting "any transfer of the interest of the insured by sale or otherwise," without the consent of the insurer, yet a deed made by the insured, conveying the goods to assignees in trust to pay creditors, will not render the policy void, the insured retaining the actual possession of the goods.

6. If by the terms of a policy of insurance the keeping or storing of certain articles on the insured premises is prohibited during its continuance, and the policy only suspended whilst they are so used, the policy is not thereby rendered void.

7. The conditions and enumerations of hazards form parts of the policy, and if articles prohibited by the policy (whether by provisions in the body of it or annexed to it) are kept by the insured, the burden is not upon the insurer to show that the keeping thereof caused the loss or increased the risk. (1 *Phillips on Ins.* sec. 886.) But the keeping of such articles by the insured, when the policy was obtained, did not render it void unless they concealed that fact from the insurer.

8. Proof of matter not alleged inadmissible.

9. In an action against an insurer, the defendant, not being presumed to know what prohibited articles were kept by the plaintiff when the loss occurred, is not bound to specify them in his pleadings. But where he specifies some, without alleging that any others were kept, the jury should not be permitted to consider any except those specified.

BENTON & NIXON, for appellants, cited 7 *B. Mon.*, 473; *Ib.*, 599; 3 *Kent*, 371; 4 *Mass.*, 230; 2 *Comst.*, 210; 3 *Dana*, 301; 4 *Whart.*, 60; *Angell on Ins.*, 102-3; 7 *Cush.*, 10; 2 *Peters*, 25; 16

Ib., 470; 7 *Ohio*, 286; 2 *Amer. Leading Cases*, 457; 14 *Barb.*, 385; *Angell on Ins.*, 147, 175, 487; 3 *Kent*, 373; 2 *Mar. & Gord.*, 243; 3 *Burr.*, 965; *Ellis on Ins.*, 38; *Hughes on Ins.*, 506; *Blaney on Ins.*, 50; 1 *Marsh. on Ins.*, 463; *Arn. on Ins.*, 536; 1 *Phil. on Ins.*, 214; *Beaum on Ins.*, 48; 18 *Pick.*, 419; 21 *Ib.*, 162; 2 *Hall*, 632; *Ib.*, 108; *Ib.*, 589; 16 *Peters*, 405; 4 *Howe*, 185; 28 *Barb.*, 412, 623; 3 *Gray*, 583; 2 *Kernan*, 89; 30 *Maine*, 273; 7 *Gray*, 257; 15 *Barb.*, 413; *Angell on Ins.*, 201, 203; 16 *Shep.*, 292; 30 *Penn. State R.*, 311; *Marsh. on Ins.*, 347; 3 *Burr.*, 1909; 25 *Conn.*, 542; 2 *Comst.*, 210.

MOOAR & O'HARA, for appellees, cited 8 *B. Mon.*, 634; *Civil Code*, sec. 153; 10 *B. Mon.*, 256; *Civil Code*, sec. 371; 15 *B. Mon.*, 631; 2 *Bibb*, 177; 6 *Mon.*, 243.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The appellant, for a premium of \$14, insured J. B. Lawrence & Co., against loss by fire, from the 25th May, 1858, to the 25th May, 1859, "to the amount of \$200 on their frame storehouse, situated on the Ohio river, in Gallatin county, Kentucky, known as Jackson's Landing—and \$1,200 on their stock of goods in said storehouse."

The policy contains this clause: "The interest of the assured in this policy is not assignable unless by the consent of this company manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void."

It also contains this clause: "In case the above mentioned premises shall at any time * * * be appropriated, applied, or used to, or for the purpose of carrying on or exercising therein any trade, business, or vocation, denominated *hazardous* or *extra-hazardous*, or specified in the memorandum of *special hazards*, in the terms and conditions annexed to this policy, or for the purpose of storing therein any of the articles, goods or merchandise in the same terms and conditions denominated *hazardous*, *extra-hazardous*, or included in the memorandum of *special hazards*, except herein specially provided for or hereafter agreed to by this company in writing, to be added to or endorsed upon this policy, then and from thenceforth so

long as the same shall be so appropriated, applied or used, these presents shall cease and be of no force or effect."

One of the conditions annexed to the policy declares that "applications for insurance must specify * * * in relation to the insurance of goods and merchandise, or other personal property, whether or not they are of the description denominated *hazardous*, *extra-hazardous*, or included in the memorandum of *special hazards*. And a false description by the assured of a building, or of its contents, or the concealment of any fact touching the risk to be assumed, * * * shall render absolutely void a policy issuing upon such description. * * * If after insurance is effected the risk is increased by any means within the control of the insured; or if such building or premises shall be so occupied in any way as to render the risk more hazardous than at the time of insuring, such insurance shall be void."

There is annexed to the policy an enumeration of *not hazardous* goods &c., viz: "staple foreign dry goods in packages, and staple domestic dry goods, in stores where no hazardous merchandise is kept, and household furniture in dwelling houses," which "may be insured at 5 cents per \$100 in addition to the rate of the building;" and an enumeration of *hazardous* goods, &c., viz: oil, sulphur, grocer's stock, tallow and several other articles, which "subject the building and all its contents to an additional charge of 10 cents per \$100;" and dry goods, (general stock of) boots and shoes, flour, teas and other articles, which "are charged 10 cents per \$100 in addition to, but do not increase the rate of the building;" and an enumeration of *extra hazardous* goods, &c., viz: rosin, spirits of turpentine, and other articles, which "subject the building and all its contents to an additional rate of 20 cents per \$100; and china unpacked, fancy goods and other articles, which are charged 20 cents per \$100 in addition to but do not increase the rate of the building;" and a memorandum of *special hazards*, in which it is declared that "GUNPOWDER, PHOSPHORUS and SALTPETRE are expressly prohibited from being deposited, stored or kept in any building insured, or containing any goods or merchan-

dise insured by this policy, unless by special consent *in writing* on the policy."

Said house and goods were destroyed by fire on the 5th April, 1859, and Lawrence & Co. afterward assigned their claim upon the policy, to J. L. Eggleston, and joined him in bringing this suit for his benefit, asserting no claim for the loss of the house, but claiming \$1,200 for the loss of the goods, and alleging in their petition that the defendant, by its authorized agent, had ascertained the amount of the loss, and promised to pay said sum of \$1,200.

The defendant denied the alleged promise, and resisted a recovery upon the following alleged grounds, among others: 1. That Lawrence & Co., when they obtained the insurance, represented themselves as the owners of said house, when in truth they were not. 2. That they had sold and disposed of the goods before the loss, and had no interest therein when the loss occurred. 3. That said house, at the time of the fire, was used to keep and store gunpowder, sulphur, rosin, turpentine and oil.

There was evidence conducing to prove that the adjusting agent of the defendant, after inquiring into the loss, had promised to pay the said sum of \$1,200.

It appeared that said storehouse belonged, not to Lawrence & Co., but to Lawrence, a member of the firm—there was no evidence of any representation on the subject except that furnished by the policy.

It appeared that on the 22d March, 1859, the members of said firm signed a deed conveying said goods to Casey & Yeager, in trust to pay debts due to them and the other creditors of Lawrence & Co.; but there was conflicting evidence upon the question whether or not the deed had been delivered and accepted, so as to take effect between the parties. And there was evidence conducing to prove that an execution remaining in the sheriff's hands, had been levied on the goods, which, however, were left in the possession of Lawrence & Co.

There was evidence conducing to prove that sulphur, rosin, turpentine, oil and saltpetre were in the house, forming part of the stock of goods at the time of the fire.

There was no evidence that any inquiries were made of the insured as to the character of their stock of goods; no evidence except that furnished by the policy, either as to the character of the goods, when the insurance was obtained, or as to the representations of the insured upon the subject; and no evidence as to the ordinary rate of insurance upon goods *not hazardous*.

The plaintiffs obtained a verdict and judgment for \$1,294, being the amount insured upon the goods, with interest, from which judgment the defendant appealed.

1. The first question relates to the affidavit of the plaintiff, J. A. Eggleston, one of the firm of Lawrence & Co., which the plaintiffs were permitted to read to the jury. The 8th condition of the policy required the insured to deliver an account of their loss, with their oath or affirmation, declaring the account to be true and just and several other facts. The defendant denied that the plaintiffs had complied with that condition. Eggleston's affidavit was admissible to prove such compliance, but for no other purpose; and the court below should have so informed the jury.

2. The next question relates to the effect of the alleged promise by defendant's agent to pay the loss upon the goods. The court below instructed the jury, in substance, that though, the policy had ceased to have any force or effect, by reason of the plaintiffs having kept prohibited articles in the house, yet, if the defendant's agent, having authority to adjust and pay losses, with knowledge that the prohibited articles were kept in the house at the time of the fire, promised to pay said loss, that they must find for the plaintiffs. This we conceive was erroneous for two reasons: First. Authority to the agent to adjust and pay losses, would not give him a right to pay out the money of the defendant where no loss had been sustained, much less to bind the defendant by a promise to do so. Secondly. Conceding the most ample authority to the agent to bind the defendant, yet, if the policy was void at the time of the fire, there was no consideration for the promise to pay the loss. We are not prepared to admit that the premium paid to the defendant, in consideration of its agreement to assume the

risk, formed even a moral consideration for its promise to pay a loss sustained by the plaintiffs after they had vitiated the policy by violating its conditions. As this instruction was given at a former trial, at which the plaintiffs obtained a verdict for \$1,200, that verdict was properly set aside by the circuit judge, though not for that reason.

3. It is contended that the policy was void because J. B. Lawrence & Co. did not own said storehouse, and that the court below erred in refusing so to instruct the jury.

Whether or not the insurance upon the house was void, we need not decide. Conceding that it was, it does not necessarily follow that the policy was void as to the goods, which were insured for a separate sum. In many cases policies have been held valid, though the interest of the insured was not correctly described. (1 *Phillips on Ins.*, sec. 640.) In the absence of evidence it cannot be presumed that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods. Policies upon goods in rented houses are not unusual. Upon the facts as presented we perceive no reason for excepting this case from the general rule by which a policy making separate insurance upon several subjects, is treated as separate policies would be. Where a policy made separate insurance upon two buildings, with a clause declaring it void if the insured should alienate the property insured, it was held that an alienation of one of the buildings did not avoid the policy as to the other. (*Clarke vs. New England Mutual Insurance Company*, 6 Cushing, 342.) That is an authority for the proposition, that if Lawrence & Co. had owned the house, and had sold it after taking the policy, this would not have vitiated the insurance on the goods, though it might have diminished their interest in preserving the house, and, consequently, their interest in preserving the goods. And in the case of *Lochner & Co. vs. Home Mutual Insurance Company*, 17 *Mass.* (2 Bennet,) 247, it was held that a policy upon a house and its furniture, though void as to the house, because the insured failed to give notice of an incumbrance, was not therefore void as to the furniture. We

perceive no reason for applying a different principle in this case.

4. The defendant asked the court to instruct the jury that, "if they believe that the possession of said goods was taken from J. B. Lawrence & Co., by the sheriff or any other person or persons, such change of possession voided the policy, and defendant is not liable upon it." In our opinion that instruction was properly refused.

There was no evidence that any one had taken the actual possession of the goods from Lawrence & Co.

Conceding that the sheriff had a constructive possession of the goods, by virtue of the levy of an execution upon them, still, Lawrence & Co., having the actual possession, had the same power, as well as the same interest, to preserve them which they would have had if the execution had not been levied; and the policy continued in force notwithstanding the levy. (*Clark vs. New England Mutual Fire Ins. Co.*, 6 Cushing, 354.)

The deed to Casey & Yeager presents a more difficult question. If that deed had taken effect between the parties, it gave to Casey & Yeager constructive possession of the goods; and if it terminated the interest of the insured in the goods, or if it was a transfer of their interest within the clause of the policy previously cited, it avoided the policy, and the court should have modified the instruction accordingly, instead of overruling it.

The deed, conceding that it was delivered and accepted, certainly did not terminate the interest of the insured. No release had been executed by their creditors. They were as much interested in preserving the property, so that it might be applied to the payment of their debts, as if they had retained the legal title. They unquestionably had an insurable interest.

But the question remains, did not said deed, if delivered and accepted, render the policy void under the clause prohibiting "any transfer of the interest of the insured by sale or otherwise," without the consent of the insurer? In 1 *Phillips on Insurance*, sec. 880, the case of *Dadmun Man. Co. vs. Worcester*

Mut. Fire Ins. Co., 11 *Metc.* 429, is cited as a decision, that under such a clause, the policy is rendered void by an assignment by the assured to assignees for the benefit of certain of his creditors. But in that case, before the loss occurred the property was sold, under an order of court, in a suit against the assured and his assignees, and the assured had thus been deprived of all interest in it.

It has been repeatedly decided, with reference to policies containing similar clauses, that the policy is not rendered void by a mortgage of the property; (*Conover vs. Mutual Ins. Co. of Albany*, 1 *Comst.* 290; 3 *Denio*, 354; *Fulson vs. Belknap Mutual Fire Ins. Co.*, 10 *Foster*, 231;) nor by a sale and conveyance, the grantee having simultaneously re-conveyed to the grantor in mortgage; (*Stetson vs. Mass. Mutual Insurance Co.*, 4 *Mass.*, 330;) nor by a conditional sale; (*Tittmore vs. Vermont Mutual Fire Insurance Co.*, 20 *Vermont*, 546;) nor by a contract to sell and convey at a future day, the purchaser agreeing on that day to pay a certain sum and secure the residue of the purchase money; (*Masters vs. Madison Co. Mutual Ins. Co.*, 11 *Barb. S. C. R.*, 624;) nor by a sale under execution, whilst the assured has a right to redeem, at least in the absence of proof that the said right is of no value; (*Strong vs. Manufacturer's Insurance Co.*, 10 *Pick.*, 40.) In most of those cases there had been a technical transfer of the title and interest of the insured; in none of them did the insured retain a greater interest in the property than Lawrence & Co. did in the goods assigned to Casey & Yeager, admitting that the deed had taken effect.

The instruction given at the instance of the plaintiffs, that said deed did not pass the title to the goods, unless "Casey & Yeager accepted of the same and received and took the possession and control of such goods," was clearly erroneous; but was not prejudicial to the defendant, because the deed, though it may have passed the title, did not avoid the insurance.

5. The defendant asked for an instruction, "that if any of the articles denominated *hazardous*, *extra hazardous*, or included in the memorandum of *special hazards*, were kept or stored in

said storehouse during the continuance of said policy, that it became void."

It is clear that this should not have been given, because the keeping of those articles, after the issuing of the policy, if prohibited by it, did not, as the instruction assumes, render the policy void, but only suspended it whilst the premises were so used.

6. The defendant asked for an instruction, "that if any articles denominated in the classes of hazards, *hazardous*, *extra-hazardous*, or included in the memorandum of *special hazards*, were embraced in the stock at the time of the issuing of the policy, or if the premises were used in keeping or storing any of the above prohibited articles at the time of the fire, then the said policy is void."

There was neither proof nor allegation authorizing that instruction.

This case cannot be placed upon the same footing as that of the *Ky. & Louisville Mutual Ins. Co. vs. Southard*, 8 B. M., 634, cited by plaintiffs' counsel. The conditions and enumerations of hazards above mentioned, formed parts of the policy, as perfectly as if they had been inserted in the body of it. If therefore the keeping by the plaintiffs of the articles mentioned in the instruction was prohibited by the policy, (whether by provisions in the body of it or annexed to it,) it was not necessary for the defendant to show that the keeping thereof caused the loss or increased the risk. (1 *Phillips on Insurance*, sec. 886.)

But the keeping of such articles by the plaintiffs, when they obtained the policy, did not render it void, unless they concealed that fact from the defendant.

There was no evidence as to what articles composed their stock at the date of the policy. At the date of the fire the stock embraced dry goods, fancy goods, groceries, boots and shoes, and many other articles denominated in the policy *hazardous* or *extra-hazardous*. If that fact authorized the jury to infer that the stock embraced the same or similar articles at the date of the policy, they might perhaps have also had a right to infer that the defendant knew that the stock embraced

those articles, or waived being informed concerning them. (*Angell on Fire and Life Ins.*, sec. 176; 1 *Phillips on Ins.*, sec. 571; *Carter vs Bochm*, 3 *Burrows*, 1905.) And if it had appeared to the satisfaction of the jury, that the defendant, when the policy was issued, knew that such articles were embraced in the stock, and were kept by the plaintiffs for sale, as part of their regular business, possibly the issuing of the policy upon that stock of goods authorized the plaintiffs to keep those articles for sale, notwithstanding the prohibition contained in the printed parts of the policy. (*Bryant vs. Poughkeepsie Mut. F. Ins. Co.*, 21 *Barbour's S. C. R.*, 154; *Delonguemon vs. Tradesman's Ins. Co.*, 2 *Hall*, 589; *Moore vs. Protection Ins. Co.*, 29 *Maine*, 97; *Leggett vs. Aetna Ins. Co.*, 10 *Rich. Law Report*, (S. C.) 202.

But we need not decide these questions, and do not propose now to express any opinion concerning them, because the defendant's pleadings do not allege that any such articles were kept in the store when the policy was issued, or that the plaintiffs made any concealment with reference thereto. Hence the jury would have had no right to declare the policy void, even if it had been proved, that when it issued the plaintiffs kept those articles and concealed the fact from the defendant.

That part of the instruction which relates to the keeping "of any of the above prohibited articles at the time of the fire," was also erroneous, because the defendant's pleadings charged the plaintiffs with having kept certain specified articles without charging them with having kept any others. The defendant, not being presumed to know what prohibited articles were kept by the plaintiffs, was not bound to specify them in its pleadings. But having done so, specifying some, without alleging that any others were kept by plaintiffs, the jury should not have been permitted to consider any except those specified.

The other instructions we need not notice. Upon the return of the cause the defendant should be permitted, if it chooses, to amend its answer.

The judgment is *reversed*, and the cause remanded for a new trial, and other proceedings consistent with this opinion.

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CASE 5—PETITION ORDINARY—JUNE 12.

Johnson vs. Offutt.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. A member of the legislature in attendance upon its session, is not privileged against being served with a summons in a civil action.
2. Under what circumstances it will furnish ground for continuance.
3. Mere change of phraseology in revising the statutes not a sufficient reason to believe that the legislature intended to change the law. (1 *Metcalfe* 621.)
4. In a suit by an indorsee against the acceptor of a bill of exchange, where the first part of the bill sued upon has been accepted, and protested for non-payment, the production of that part of the bill is *prima facie* sufficient to entitle the plaintiff to a judgment. It is not necessary to file the second part. The defendant must shew that some ground of defense exists which displaces the *prima facie* title made out by the plaintiff. So, where the action is for non-acceptance, it is sufficient to produce the part of the bill protested for non-acceptance. (18 *Peters*, 205.)

BECK, CRADDOCK and RODMAN, for appellant, cited 2 *Revised Statutes*, sec. 1 p. 119; 4 *Litt.*, 123; *Bolton vs. Martin*, 1 *Dallas*; 2 *Starkie*, 142; 2 *Greenleaf*, 150; 7 *Johnson*, 442.

T. N. LINDSEY, for appellee, cited 1 *Chitty's Pleading*, top page, 385; 4 *Litt.*, 122; *Edwards on Bills*, 162, 163; 13 *Peters*, 205.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Offutt, the indorsee, sued Johnson, the acceptor of two bills of exchange, in the Franklin circuit court, and the summons was served in Franklin county. Upon the calling of the cause Johnson moved to quash the service of the summons, upon proof that he was a citizen and resident of Scott county, and representing that county as a member of the House of Representatives when the suit was brought, and the summons

served and at the time of said motion, and that the legislature was then in session. The motion was overruled.

Johnson then moved the court to require the plaintiff to file the second part of the bill of exchange sued on, the suit having been brought upon the first part. But the court refused to require the plaintiff to file the same or to give any account of it.

Defendant then moved for a continuance till the next term, relying upon the facts above mentioned. That motion was overruled, and no answer having been filed, judgment was rendered against him, from which he appealed.

In the case of *Callett vs. Morton*, 4 *Littell*, 122, it was decided that a member of the legislature was not privileged against being served with any process in a civil suit not requiring bail, either by the constitution of 1799 or the act of 1795. (2 *Statute Law*, 1,111.)

The present constitution is the same upon this subject as that of 1799.

The act of 1795 declared, that "no person or persons shall, under any pretense, directly or indirectly, by any ways or means whatever, arrest, assault, menace, or otherwise disturb the person of a member, during his privilege, except on legal process for treason, felony, or breach of the peace." In *Callett vs. Morton* the court apparently attached some importance to the fact, that the act prohibited only a disturbance of the person of a member.

The statute now in force declares, "that the members of the general assembly shall, in no wise, be disturbed or embarrassed in the great and important business of legislation. They shall not, directly or indirectly, by any ways or means, be arrested, menaced or otherwise disturbed during the existence of their constitutional privilege, except on legal process for treason, felony, breach of the peace or misdemeanor." (*Revised Statutes*, chap. 62, sec. 1.)

It is contended that the word *person* was omitted from this statute, in view of the decision in *Callett vs. Morton*, and for the purpose of prohibiting anything which might disturb the thoughts or agitate the feelings of a member attending the legislature.

The statute, thus construed, would, during a session of the legislature, make it unlawful for a sheriff to sell a member's property under an execution previously levied; or to levy an execution on his property under a judgment previously rendered; or for a member's friend to warn him of any pending misfortune; because any of those things might, to some extent, divert his thoughts from his public duties, and disturb that serenity of mind which is insisted upon as being necessary for their performance.

A man has no right to complain, or to feel disturbed, because he is sued for failing to perform his contracts. But it is said, that if a member can be sued, he may be harrassed by unjust demands; and, therefore, the object was to prevent him from being sued at all during his privilege. To give the statute that effect, the court, whenever a member is sued, must take judicial notice of the fact, and of its own motion dismiss or continue the cause, which would be impossible. The defendant, to take advantage of his privilege, must show that he is a member; and it can give him but little additional trouble to prepare an answer, if he has a defense, and an affidavit that he cannot prepare for trial without neglecting his legislative duties; or an affidavit showing that he has a defense, but cannot prepare his answer without such neglect; in either of which cases he should have a continuance. But if he has no defense, the rendition of a judgment against him is not, in our opinion, such a disturbance as the statute was designed to prohibit. The difference between the phraseology of this statute, and of that of 1795, furnishes no sufficient reason to believe that the legislature intended to change the law. (*Overfield vs. Sutton*, 1 Met., 621.) The motion to quash the service of the summons was properly overruled.

The only authorities cited in support of the motion requiring the plaintiff to file the second part of the bill of exchange, are 2 *Greenleaf's Ev.*, 154; 2 *Starkie's Ev.*, 142, (6th Am. Ed.) Greenleaf refers to no authority except Starkie, and Starkie refers to no authority. The only case we have found upon the subject is that of *Dowens & Co. vs. Church*, 13 Peters, 205, in which it was decided, for reasons which seem to us entirely

Applegate & Co. vs. Murrill et al.

satisfactory, and which we need not repeat, that in a suit by an indorsee against an indorser, for non-acceptance of a bill, the production of that part of the bill which had been protested for non-acceptance was *prima facie* sufficient to entitle the plaintiff to a judgment; and that it was matter of defense on the other side, to show either that some other bill of the set had been presented and accepted, or paid; or that it had been presented at an earlier time, and dishonored and due notice had not been given; or that another person is the proper holder, and has given notice of his title to the party sued; or that some other ground of defense exists, which displaces the *prima facie* title made out by the plaintiff. The same principle applies in a suit by an indorsee against the acceptor, where, as in this case, the part of the bill sued upon has been accepted.

The judgment is *affirmed*.

CASE 6—PETITION EQUITY—JUNE 13.**Applegate & Co. vs. Murrill et al.****APPEAL FROM THE SCOTT CIRCUIT COURT.**

See the opinion for a statement of facts in this case adjudged sufficient to bring it within the operation of the act of 1856, prohibiting sales, &c., made by debtors in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion in whole or in part of others.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Murrill, and other creditors of Applegate, sued him and others on the 19th March, 1859, alleging, in substance, that he, with the aid of Maddox, had sold a part of his property, within six months past, in contemplation of insolvency, and with the intent to prefer one or more of his creditors to the exclusion, in whole or in part, of the plaintiffs and others, and

praying that his property might be subjected to the payment of his debts *pro rata*, according to the provisions of the act of 1856. (*Session acts, 1855-6, vol. 1, page 107.*)

Applegate and Maddox denied that at the time of the sales complained of, either of them knew or believed that Applegate was insolvent, and say they believed he would be able to pay all his debts, and that said sales were made to wind up his business, and pay his debts, and not to prefer any creditor, nor in contemplation of insolvency. A judgment in accordance with the prayer of the petition was rendered by the court below, from which Applegate and Maddox took this appeal.

The following facts appear: On the 7th March, 1859, Applegate, who was a retail grocer in Georgetown, executed a power of attorney, authorizing Maddox, his father-in-law, to sell his property of every description, collect debts due to him, pay debts owing by him, and transact and perform all his business of every kind. Applegate then owed Maddox about \$2,000, and owed about \$3,000 for which Maddox was his surety, and other debts to the amount of about \$5,000, making in all over \$10,000, for a considerable part of which suits were pending against him; and his property, (consisting of a dwelling-house, furniture, and interest in several slaves, merchandise, and choses in action,) was not worth more than about \$4,000. Maddox promptly commenced collecting the debts, and selling the merchandise by private and public sale, and so continued until this suit was brought. It appears that several notes, given by purchasers of the merchandise, were taken by Maddox, payable to his individual order, and it does not appear that any of the notes for merchandise were made payable to Applegate. A clerk employed to aid in selling the merchandise testifies, that he was instructed by Maddox not to let any of the purchasers set off their claims on Applegate against their debts for merchandise, and that three creditors who applied for such offsets, were refused. An attorney, representing two other creditors, applied to Maddox to know whether the proceeds of the property would be applied to Applegate's debts *pro rata*, and Maddox replied that he had no

answer to make. Another creditor, who called on Maddox during the progress of the sale, was told by him that he should be paid; that he (Maddox,) thought there was enough to pay all. All the money obtained by Maddox by selling the merchandise and collecting the debts due to Applegate, was applied by him to the payment of debts for which he was Applegate's surety. Applegate was in bad health, and unable to attend regularly to business, though he was not confined to his house, and was at the store occasionally during the progress of the sale by Maddox.

In our opinion the condition of Applegate's health, and of his pecuniary affairs, rendered it advisable for him to close his mercantile business, and the employment of an agent for that purpose would have been proper and perhaps necessary. But Maddox was not employed merely for that purpose.

The power of attorney, in effect, authorized Maddox to pay such of Applegate's debts as he might choose. That he would pay those due to himself, or for which he was liable as surety, was a result so natural that it must have been contemplated by Applegate. That this was contemplated by both of them seems evident from their conduct, as there is no reason to doubt that Maddox's application of all the money realized, to the debts for which he was bound as surety, and his refusal to pay or to allow anything to other creditors, met Applegate's approval.

In view of the limited circle of Applegate's business, of the excess of his liabilities over his assets, and of the suits against him, he must be regarded as having known that he was insolvent when he executed the power of attorney. The statute would be of little value to creditors, if the courts should require them to produce stronger evidence than the facts above mentioned, in order to prove a debtor's knowledge of his insolvency.

Our opinion is, that Applegate's sales, through Maddox as his attorney, were made by him in contemplation of insolvency, and with the intent to prefer Maddox, and those to whom he was bound as surety, over the other creditors.

Wherefore the judgment is *affirmed*.

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CASE 7—APPEAL IN WILL CASE—JUNE 14.

Dougherty, &c. vs. Dougherty, &c.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. "As I intend starting in a few days to the State of Missouri, and should anything happen that I should not return alive, my wish is, that all of my land," &c., [going on to devise an estate.] The author of the paper made the contemplated trip, returned to Kentucky and died. *Held*, that the instrument is contingent and inoperative as a will.

2. See opinion for the subsequent acts, parol and written declarations of the decedent, held not sufficient to establish a re-execution or republication of the instrument as a will.

3. *Quere*. Can a contingent will, after the happening of the event which was to terminate its effect, be revived by any kind of a re-execution which would give it the force of a will?

4. The case of Maxwell's will, (3 *Metcalfe*, 101,) cited and approved.

A. J. JAMES, for appellants, cited 1 *Williams on Executors*, 89, 90, 169, 170, 171, 172, 154; 2 *Met.*, 364; 2 *Jarman on Wills*, 743; 1 *Ib.*, 78 and note.

JOHN RODMAN on same side, cited 3 *Phillemon's Rep.*, 397; 1 *Vesey*, 190; 2 *Met.*, 367.

JAMES HARLAN, SR., and JAMES HARLAN, JR., for appellees, cited 7 *Dana*, 94; 1 *Vesey, Sr.*, 190; 2 *Watts & Sergeant*, 145; 3 *Met.*, 111; 14 *Grattan*, 332.

T. N. LINDSEY, on same side, cited 1 *Vesey, Sr.*, 190; 2 *Watts & Serg.*, 145; 6 *Vesey*, 608; 1 *Williams on Executors*, 153; 3 *Met.*, 101; 2 *Rev. Statutes*, 458.

CHIEF JUSTICE STITES DELIVERED THE OPINION OF THE COURT:

A paper offered for probate, as the last will of James Dougherty, dec'd, having been rejected by the county and circuit court of Franklin, is brought before us by appeal from the latter tribunal, and the only question to be considered is, whether said paper should have been admitted as a valid will.

Two objections are taken to the paper as a will. *First*. That it was not published and authenticated in the manner prescribed by law; and *Second*. If so published and authenticated, that the testator was disqualified, by reason of mental incapacity, from making a will.

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The paper in question bears date October 4, 1857, and is wholly in the handwriting of the decedent. It begins in the usual form, and furnishes the reason for making it as follows:

"In the name of God, amen. I, James Dougherty, of the county of Franklin, and State of Kentucky, hath this day made this my last will and testament, *as I intend starting in a few days to the State of Missouri*, and SHOULD ANYTHING HAPPEN that I should not RETURN ALIVE my wish is, that all of my land and negroes, and all I leave behind me, after paying my just debts, be kept in the hands of the Bishop of the Diocese of Scott county, as trustee," &c.

The decedent made the contemplated trip to Missouri, returned home, and died in December, 1861.

In our judgment the foregoing language used by the decedent in the outset of the paper, being unmodified and unrestricted by other words or expressions in the subsequent or remaining portions of the instrument, brings it directly within that class of instruments denominated "contingent" wills, and intended to take effect upon the happening or not happening of a certain event.

The words in relation to the trip to Missouri contain two ideas: the one a reason for making a will, and the other the condition upon which the paper is to take effect as a will.

The expression "*as I intend starting in a few days to the State of Missouri*," refers to the contemplated trip as the reason for the making the will; and the remainder of the language, "*and should anything happen that I should not return alive, my wish is*," &c., makes, in unequivocal terms, a contingency or condition upon which the paper was to operate as his will.

The case of Maxwell's will, decided at the Summer term, 1860, (3 *Metcalfe Ky. Rep.*, 101,) is directly in point in support of this construction, and the authorities there referred to apply with equal force here.

The decedent having, as we have seen, returned from Missouri alive, and the paper thereby becoming inoperative as a will, the next inquiry is, whether the evidence relied on by appellants shows a re-execution or republication in the mode

required by the Revised Statutes. (2 volume Stanton's edition, pages 458, 459, 460.)

It is conclusively shown, that a short time before his death the decedent repeatedly declared the paper in question to be his will, and Mr. Lancaster, a minister of the gospel, proves that the decedent, upon an occasion when he was called in to see him, handed to him the paper, and desired him to have it recorded as his will, and at the same time handed to him three other papers, two of which were notes, dated Oct. 5, 1857, addressed to Lancaster, touching the instrument now in question, and the other a testamentary paper bearing date May, 1856.

The notes were as follows:

"FRANKLIN COUNTY, Ky., Oct. 5, 1857.

REV. JAMES M. LANCASTER:

Dear Sir—I wish you to have the enclosed document recorded as it is written, if it should be the will of God that I should die before I return home again. The enclosed is my last will and testament, worded by me.

Yours respectfully,

JAMES DOUGHERTY."

"FRANKLIN COUNTY, Oct. 5, 1857.

REV. JAMES M. LANCASTER:

Dear Sir—I wish you to examine these documents that are enclosed. My preference is for the last one, if it is according to law, to have it recorded, if it is not, have the other recorded. You understand my wish is the last one written. You can get the cost out of my estate, or my brothers, for recording and attention.

Yours respectfully,

JAMES DOUGHERTY."

The three papers mentioned, together with that now in question, were all enclosed in an envelope together, which was addressed to Lancaster. The notes bear date the day after the execution of the paper in contest, and evidently refer to the two wills or papers purporting to be such. They seem to have been written and addressed to Lancaster before the decedent left for Missouri, in 1857, but never delivered until just before his death. They bear the same date, relate to the

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same subject matter, and must therefore be treated as one, especially as they were enclosed in one envelope, and addressed to one and the same person. These facts, with other evidence of the parol declarations of the decedent, leave no room to doubt that he desired his property to go in the manner indicated by the paper before us. But such desire, however apparent, can, in a legal sense, avail nothing, unless manifested in the mode prescribed by law, which, in our opinion, has not been done in this case.

In the case of Maxwell's will, *supra*, it was doubted whether under the law, a contingent will, after the happening of the event which was to terminate its effect, could ever be revived by any kind of re-execution which would give it the force of a will; because, as was said, "it would seem that an act which would give vitality and effect to the disposing part of the writing, would be the making of a new will, which must be made and published in accordance with the requirements of the statute, in which case it would be the new instrument which would be probated, and not the one in which the testamentary disposition was originally contained."

Upon this hypothesis, it was said that the eleventh section of the statute, *supra*, and the rule in regard to the re-execution of revoked wills, would not apply to contingent wills. But upon the assumption that the evidence in that case did show, on the part of the decedent, an intention and desire to revoke the contingency contained in the paper offered for probate, the court held that it should not be admitted to probate as a re-executed will, because the re-execution could not be established by evidence of parol declarations made by the decedent in relation to the paper, but only in the mode prescribed by the law, which declares, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by re-execution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown." The manner in which a codicil is required to be executed is the same prescribed for the execution of wills. (See *secs. 5, 10, 11, Rev. Stat., Stanton Ed., 2 vol., pages 458, 459.*)

It is not pretended here that there was any re-execution of the paper, as a will, by writing prepared and signed by the decedent, *after* his return from Missouri; nor that he acknowledged the same in the presence of two witnesses, who subscribed their names as required by *sec. 5* of the *statute, supra*. But it is contended that his acts, already stated, and his declarations to Lancaster, amount to a re-execution within the meaning of the law. To this it may be replied, that there is nothing in this case to distinguish it from the Maxwell case, *supra*, except the delivery of the paper and accompanying notes by the decedent to the witness, with the declaration that the paper was his will. These facts do not relieve it from the operation of the rule settled in that case, because they can, in no sense, be deemed more than the parol declarations of the decedent. The notes were written prior to his Missouri trip, and when considered together, as they must be, only furnish further evidence of the contingent character of the paper in question. If they could, for any purpose, be regarded as parts of the paper, they do not, at all, conflict with the contingency upon which the same was to become a will, and would therefore, furnish no ground for exempting it from the operation of the law requiring a re-execution of the same. But they cannot be so considered, and must be treated simply as a part of the declarations made by the decedent outside the paper sought to be set up as a will.

The case of Maxwell, and the authorities there cited, in our opinion, are conclusive against the appellants in this case, and upon that authority, and for the reasons stated, the judgment of the circuit court is approved.

This conclusion renders it unnecessary to notice the objection as to the want of capacity of the decedent to make a will.

Judgment *affirmed*.

Bondurant vs. Apperson.

CASE 8——JUNE 14.

Bondurant vs. Apperson.

APPEAL FROM THE CLARK CIRCUIT COURT.

1. A judgment cannot be final merely because it decides some question of law or fact, relating even to final relief, nor merely because it decides what are the rights of the parties as to such relief.

2. A judgment to be final must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose without further action by the court or by process for contempt.

3. See the opinion for a discussion of the question *supra*, and citation of authorities.

T. F. HAZELRIGG, for appellant.

R. APPERSON, for appellee.

JUDGE BULLITT, DELIVERED THE OPINION OF THE COURT:

In a suit against the Lexington and Big Sandy railroad company, a controversy arose, upon cross-petitions, between the appellant and appellee, concerning their mutual rights and liabilities growing out of sundry notes and bills of exchange alleged to have been executed by them, to raise money for the use of said company, Bondurant contending that, as between him and Apperson, the latter is liable for the full amount of said notes and bills; Apperson contending that, as between them, Bondurant is liable for half of said amount.

Upon this branch of the case a judgment was rendered, in which the circuit judge, after arguing the facts and law of the case, declared: "I am of opinion, therefore, that upon all those bills where Bondurant was an original party, whether as drawer or endorser, he must share equally the loss with Apperson, and such is the judgment of the court upon the question submitted."

From that judgment Bondurant took this appeal.

The first question is, whether or not the judgment is *final*.

Doubts among intelligent members of the bar, as shown in this and other cases lately before us, as to what constitutes a final judgment, and as to the principle upon which that ques-

tion depends, have led us to examine the subject, in this case, more fully than might otherwise have seemed necessary.

It has been said that a decree "which decides upon and settles the rights of the parties to any particular matter, is so far final." (*Banton & Co. vs. Campbell's heirs*, 2 Dana, 421.) That is no doubt true, provided the thing settled is of a final as distinguished from an interlocutory character; but that does not solve the chief difficulty presented in such cases, which is to ascertain whether or not the judgment *does* "decide upon and settle" any particular matter. In the case before us, the judgment decides upon the appellee's right to contribution, but does it *settle* that matter?

The character of a judgment, as to finality, appears sometimes to have been regarded as depending upon the question, whether an execution or other process could issue upon it. That, clearly, is not a true test. A judgment may take effect by its own force and be final, though no process can issue upon it. For example, a judgment confirming a commissioner's deed, and a judgment dismissing a suit, even without costs.

It has been frequently said, that a judgment is not final, unless it can be enforced without further action by the court. It is clear, however, that a judgment, ordering the defendant to execute a conveyance to the plaintiff, is final. (*Larue vs. Larue*, 2 Litt., 258; *Watson vs. Thomas*, Litt. Sel. Cases, 248.) Yet such a judgment cannot be enforced except by process for contempt, which cannot issue without further action by the court.

It is certain, however, that a judgment cannot be final merely because it decides some question of law or fact relating even to final relief, nor merely because it decides what are the rights of the parties as to such relief. (*Jameson vs. Mosely*, 4 Mon., 414; *Phillips & Co. vs. Alcorn*, 4 J. J. Mar., 38; *Craig vs. McBride's heirs*, 9 B. Mon., 9; *Portwood vs. Outon*, 1 B. Mon., 149; *Mitchell vs. Cloyd*, Mss. Opin., February 1854.) Those cases furnish various illustrations, proving that a judgment may decide every question of law and fact, and what are the rights of the parties to everything involved in a suit, without

being final to any extent. In each of them the judgment was held to be not final, because it could not be enforced, to the extent of giving the final relief contemplated by it, without further action by the court.

The rule adopted in those cases is forcibly illustrated by the decisions in New York, and in this State, as to *nisi* decrees in suits to foreclose mortgages. We understand that in New York the *nisi* decree directs a payment of the mortgage money to a commissioner, and directs him, if it should not be paid, to sell the property; no further action by the court is needed to effect a sale, and consequently such decrees in New York are held to be final. But in this State a *nisi* decree is interlocutory, because the relief contemplated by it—viz: a sale of the property—cannot be obtained without further action by the court; if the defendant should deny the execution of the mortgage and plead payment of the debt, and the court in its *nisi* decree should decide those questions against him, still the decree would be merely interlocutory.

Judgments enforceable by process for contempt form the only exception we are aware of to the above mentioned rule.

The following rule seems to be deducible from the authorities, viz: that a judgment, to be final, must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose without further action by the court or by process for contempt.

In a case recently considered by us the case of *Banton & Co. vs. Campbell's heirs, supra*, was cited as maintaining a different doctrine from the one here stated. We do not, however, so regard it. That was a suit between heirs for partition and distribution of an estate. The court rendered a decree, that eight of the heirs were entitled to the land left by the decedent, and appointed commissioners to allot it to them; and another decree, that all the heirs were entitled to distribution of the personalty, and appointed commissioners to ascertain how much each had received, and then to make just and equal distribution among them all. We presume that this court, in pronouncing those decrees final, regarded them as

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authorizing the commissioners not merely to report to the court a proposed allotment and distribution, but to make the allotment and distribution without further action by the court. Thus viewed, those decrees were clearly final. If viewed otherwise, the decision, that they were final, is inconsistent with the other cases previously cited, and also with that of *Thompson vs. Peebles*, 6 Dana, 389, which was a suit for land, to which the complainant asserted an equitable title; and a decree sustaining his claim, and ordering the defendants to convey the legal title to him, was held to be not final, because, from its peculiar phraseology, it was regarded as merely contemplating that the defendants should prepare and produce the deed for the action of the court at its next term.

The judgment appealed from in this case is not final, because it contains nothing more than a decision as to the right of the parties. It gave no relief to the appellee, nor can he get any relief upon it by any sort of process.

Wherefore the appeal is dismissed.

CASE 9—PETITION EQUITY—JUNE 23.

Yeaker's heirs vs. Yeaker's heirs.

APPEAL FROM THE WOODFORD CIRCUIT COURT.

1. An alien cannot inherit land in this State. (*Hardin* 67; 2 *Metc* 187.) But an alien friend, residing in this State two years, is entitled to receive, hold and pass any right to land within the Commonwealth during the continuance of his residence after that period. (1 *Statute Law*, 112; 1 *Revised Statutes*, 339.)

2. Treaties take effect, as to the governments making them, from the date of their execution, unless they contain stipulations to the contrary. But in regard to individual rights the rule is that the ratification of the treaty must be deemed its date.

3. By the constitution of the United States where a treaty, made under the authority of the United States, conflicts with a law of the State, the law must give way to the extent of its conflict with such treaty.

4. It is a well settled rule that where a State law is deemed unconstitutional, be-

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cause opposed to the constitution, laws and treaties of the federal government, it is only void so far as it contravenes the constitution, laws or treaties.

5. Where, by a treaty with a foreign nation, foreigners are allowed three years within which to claim real estate coming to them in this State by devise or descent, and to make disposition thereof, they must assert their right within that period, because there is nothing forbidding the State legislation which denies the right to that class of persons after that time—the State law being so far affected by the treaty as to become inoperative for that period but no further.

6. See the opinion as to the scope, construction and effect of certain treaty stipulations between the United States and the Swiss Confederation in relation to the question of the right of citizens of Switzerland to acquire or hold by devise or descent an interest in real estate or its proceeds in Kentucky.

GEO. B. KINKEAD, for appellants.

M. C. JOHNSON, for appellees.

CHIEF JUSTICE STITES DELIVERED THE OPINION OF THE COURT:

Peter Yeaker, a native of Switzerland, many years ago removed to, and became a naturalized citizen of, the United States. He died in Woodford county in this State, in July 1853, the owner of a considerable estate in said county, consisting of land, slaves and personalty. He left a widow, a native of this country, but no children, and all of his kindred, at the time of his death, were, and so far as the record shows, continue to be foreigners and citizens of Switzerland.

In 1859 proceedings were commenced for a sale and distribution of the estate between the widow and kindred of the intestate, and the circuit judge, having decided that the latter were not entitled to any part of the realty, they have prosecuted this appeal.

At common law an alien could not inherit land, and such has been and is still the law in Kentucky, except so far as it has been modified by statute. It was determined at an early day by this court that aliens could not inherit land in this State. (*Hunt vs. Warnick, Hardin*, 61; *White vs. White*, 2 *Mct.* 187.)

By an act of 1800 (*Morchead & Brown's Digest*, 1 vol. 112)—an alien friend, residing in this State two years, was entitled to receive, hold and pass any right to land within the commonwealth, during the continuance of his residence after that period; and this provision was substantially embodied in the Revised Statutes. (1 vol *Stanton*, 239.) But as neither of ap-

pellants were residents of Kentucky at the time of Yeaker's death, no benefit accrued to them under this statute.

Indeed it is admitted that, unless they can claim under certain treaty regulations between the foreign State, of which they are citizens, and the United States, the judgment of the circuit court, declaring the widow entitled to the land, cannot be disturbed. And it therefore becomes necessary to consider and determine the scope and effect of the treaties relied on.

The first treaty between the United States and the Swiss Confederation, to which we have been referred, was ratified on the 3d May, 1848, and is found in the United States Statutes at large for that year.

Among other stipulations it contains the following:

"ARTICLE 2.—If, by the death of a person owning real property in the *Territory* of one of the high contracting parties, such property should descend either by the laws of the country, or by testamentary disposition to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a *term of not less than three years* shall be allowed to him to dispose of such property, and to collect and withdraw the proceeds thereof, without paying to the government any other charges than those, which in a similar case, would be paid by an inhabitant of the country in which such real property may be situated."

By the 3d article it is provided that said treaty shall remain in force for twelve years from its date, and further, until the end of twelve months after either government shall have given notice of its intention to terminate the same.

The second treaty seems to have been signed in November 1850, but was not ratified until November, 1855. (*U. S. Statutes at large* 1855.) The official proclamation of the President, making it public, as a law, speaks thus of the treaty, the period of its execution and the amendments to the same:

"Whereas, a general convention of friendship, reciprocal establishments, commerce and for the surrender of fugitive criminals, between the United States of America and the Swiss Confederation, was concluded and signed by their respective plenipotentiaries in the city of Berne on the 25th day

of November, 1850; which convention as *subsequently amended* by competent authorities of the respective governments, and being in the English and French language, is word for word as follows," &c.

The stipulations of this treaty in regard to the subject now under consideration read thus:

"ARTICLE 5. The citizens of each one of the contracting parties, shall have power to dispose of their personal property within the jurisdiction of the other by sale, testament, donation or in other manner; and their heirs, whether by testament, or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated, shall be liable to pay in a similar case. In the absence of such heir, heirs or other successors, the same care shall be taken by the authorities for the preservation of the property that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same."

"The foregoing provisions shall be applicable to real estate situated within the States of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate."

"But in case real estate situated within the territories of one of contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

If, as is contended by appellants, this last treaty, by relation back from November, 1855, the day of its exchange and ratification by the contracting powers, took effect and became the law of the land from November 1850, the day of its date, without regard to the period or periods when the amendments referred to in the proclamation were agreed upon and adopted, we confess there is difficulty in avoiding the conclusion that appellants, under the articles cited, have an interest, to some extent, in the real estate of their deceased relative.

The constitution of the United States, in the second section of article VI, declares that "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The treaty before us seems to have been made with due solemnity between the contracting parties, adopted and ratified by the proper authorities, and proclaimed as the law of the land by the President. Its provisions with regard to real estate, appear to have been carefully drawn, with an eye to the rights of the several States and their local regulations respecting such property, within their boundaries, and give to the subjects of the Swiss Confederation only the share of the proceeds of the realty, when by the laws of any State they are forbidden from holding the realty itself.

It may be said to be the well settled doctrine in relation to treaties, that, as to the *Governments* making them, they take effect, not merely from the day of ratification, but from the date of their execution, unless they contain stipulations to the contrary. (*Wheaton's International Law*, 336; 1 vol. *Kent*, 170; 9 *Howard S. C. Rep.*, 148, 289.) But the rule seems to be otherwise where individual rights are to be affected thereby, as settled by the supreme court in the case of *United States vs. Arredondo*. (6 *Peters*, 749.) In regard to that point, which was then raised, the court, in speaking of the treaty then under consideration, say "That it may and does relate to its date as

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between the two governments, so far as respects the rights of either under it, may be undoubted; but as respects individual rights, in any way affected by it, a very different rule ought to prevail." And in the next sentence, after remarking that the point was not new, state, that in regard to individual rights, the rule is, that the ratification of the treaty must be deemed its date..

Admitting however that the rule contended for in this case, was the correct one, it is extremely questionable whether this court could say, in view of the proclamation of the President, *supra*, that the articles of the treaty relied on by appellants in support of their claim, constituted any part of the original treaty when signed.

It seems that the original document was signed in Nov. 1850, but it further appears that it was subsequently amended. Now what amendments were made, or when, does not appear. For aught that appears to the contrary the very articles upon which appellant founds his claim, may have been the only amendments made, and they may have been inserted long after Yeaker's death and the accrual of the widow's right. And, in view of this state of uncertainty as to when the articles referred to were embodied, it would be difficult to say they were in force when Yeaker died. But this point need not now be decided, inasmuch as the treaty, for the reason heretofore stated, so far as Mrs. Yeaker's rights are concerned, did not go into effect until 1855, when it was ratified.

The treaty of 1848, in our opinion, is likewise insufficient to uphold appellants' claim to an interest in the property now in dispute—Because (1.) it may be seriously doubted whether the second article of said treaty intended to confer upon the citizens of the confederation any right to real estate or its proceeds, unless the land was situate within the territories of the United States, that is, the districts of country known as "territories," and distinguished from the States.

The language is "If, by the death of a person owning property in the Territory of one of the high contracting parties, such property should descend," &c.

The doubt mentioned arises, not only because of the equivocal language thus used to describe the district of country in which the proposed right of succession or inheritance was to be conferred; but also from the fact that the treaty of 1855, in reference to the same matter, is specific and distinct in extending this right to land within *the States* of the Union, and also in providing for any conflicting State or local legislation—thus showing that the contracting parties themselves deemed the right conferred by the previous treaty as not distinctly extended to the States.

But, waiving the question arising upon a proper construction of the language of the treaty in regard to the point suggested, and giving full effect to the provision as contended for by appellants, still they are precluded from the interest claimed by lapse of time.

We have seen, and it is admitted, that by the law of Kentucky appellants could take no interest in the realty of their deceased relative. It is also well known that by the statutes of descent (*1st Stanton Ed.*, 420,) the widow, in this case, took the entire real estate. This being the law of this State it was in full force and effect, so far as the parties hereto are concerned, except as restricted by article 2 of the treaty of 1848. To the extent of its conflict with said treaty it must give way, because, by the constitutional provision *supra*, the treaty is regarded as paramount to the State law. The law of the State refuses all right to appellants at any and all times; the treaty however invests them with an interest provided it is asserted within a period of three years after the right accrues; or rather it forbids any law limiting their right of recovery to less than three years, the effect of which is to permit any restriction by State legislation against such recovery, which will not interfere with the right for that period. The State law was therefore so affected by the treaty as to become inoperative for a period of three years, but no further—it being a well settled rule that when a State law is deemed unconstitutional, because opposed to the Constitution, laws and treaties of the Federal Government, it is only void so far as it contravenes the Constitution, laws or treaties. Beyond the three years, the

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period within which foreigners may claim such interest, there is no contravention, because there is nothing forbidding the State legislation which denies the right to that class of persons after that time.

It seems to us, therefore, that no error was committed by the circuit court in giving all the proceeds of the land to the widow—appellants having permitted more than three years after Yeaker's death to elapse before they brought their suit or asserted their right.

Judgment affirmed.

CASE 10—MOTION—JUNE 24.

Woodcock, &c. vs. Bowman, &c.

APPEAL FROM GARRARD CIRCUIT COURT.

1. The statute authorizing the sale of the real estate of infants must be strictly complied with. The report of the commissioners appointed to appraise the estate of the infants, must be *full* and *explicit* on all the matters which, by the statute, they are required to ascertain and report to the court. Without this the court has no jurisdiction to decree a sale.

2. Among other things the report of the commissioners must show "the *net value* of the real and personal estate, and the annual profits thereof." See the opinion for a report held insufficient in its statement of the value of the infants estate, as well as in other respects. It must state the "*net value*."

3. An order appointing commissioners authorized them simply to "value the infants real estate." It may well be questioned whether such defect in the order of appointment would be cured by a report subsequently made in conformity with the law and approved by the court—a point not decided.

A. J. JAMES, for appellants, cited 16 *B. Mon.*, 295; 18 *Ib.*, 387; 2 *J. J. Mar.*, 511; *Mattingly vs. Read*, 3 *Mct.*

R. M. BRADLEY, on same side, cited 16 *B. Mon.*, 296; 18 *Ib.*; 390; *Ib.*, 781; 1 *Mct.*, 262; *Ib.*, 424; *Ib.*, 284; 2 *Ib.*, 291; *Willey vs. Clark*, *Ms. opin. Sep.* 1854.

G. W. DUNLAP, for appellees, cited *chap.* 86, *Rev. Statutes*.

BURDETT, on same side, cited 16 B. Mon., 296.

JUDGE DUVALL DELIVERED THE OPINION OF THE COURT:

On the petition of Bowman, as statutory guardian of the infant heirs of D. E. Harrison, deceased, the Garrard circuit court rendered a judgment, ordering a sale of one hundred and four acres of land belonging to the infants. At the sale made by the commissioner under this judgment, Woodcock became the purchaser of the land, and executed bond with security for the price. The bond having matured, and execution thereon having issued, Woodcock, the purchaser, and his sureties, upon regular notice to the guardian and his wards, moved the court to vacate and set aside the judgment and all proceedings under it, on the ground that the judgment was *void*, and that the purchaser acquired no title to the land.

The court below, on final hearing, overruled the motion, and Woodcock, &c., have appealed.

The validity of the judgment under which the appellants purchased, is questioned on various grounds:

1. It is insisted, that the commissioners who were appointed to appraise the estate of the infants failed to "report the *net value* of their real and personal estate, and the annual profits thereof," and that therefore the court had no jurisdiction to decree the sale.

This objection is well taken. The report merely shows that the infants had a tract of one hundred and four acres of land, "each share being worth \$3,640;" "two slaves, worth \$2,000;" and "cash paper worth about \$2,000," the aggregate annual profits of which were *worth* \$395. Whether *each* infant owned two slaves, and cash paper of the value stated, does not certainly appear. But the palpable and fatal defect in the report is, that it utterly fails to disclose, in terms or in substance, the *net value* of their real and personal estate. The statute which requires this to be shown is as peremptory and as plain as language can make it. It is one of the many additional safeguards which the legislature, in view of the operation and judicial exposition of the former laws on the same subject, has chosen to throw around the titles of this helpless class of pro-

prietors. With these wise and wholesome requirements of the law the courts cannot dispense, if they would, in order to relieve the hardship of particular cases. There is no difficulty in complying with them, and they must be complied with before the court can assume jurisdiction to divest the infant of his title.

The distinction between the *net value* and the *gross value* of an infant's estate, whether in lands or personalty, is too obvious to require comment. He may derive title, by descent or otherwise, to lands worth twenty thousand dollars, and yet the *net value* of his *estate* in such lands may not be equal to the half or the fourth of that sum. And so of other property. The report before us may be literally true, in every particular, and yet it may also be true that the *net value* of the *estate* of the infants in the property described, is greatly less than the sum stated. The report therefore falls far short of meeting the demands of the statute, in failing to afford to the court anything like an adequate idea of the real and true condition of the infants with respect to their estate. As has been heretofore said by this court, the facts alluded to are required to be reported, to enable the court to determine whether or not a sale of the land in the petition mentioned would be for the benefit of the infant. "The law in this respect must be strictly complied with, and the report of the commissioners must be *full* and *explicit* on all the matters which, by the statute, they are required to ascertain and communicate to the court." (*Carpenter, &c. vs. Strother's heirs*, 16 B. Mon., 296.) The same general doctrine has been carefully followed in a number of subsequent cases not necessary to be cited.

We would not be understood as requiring that the commissioners should in all cases adopt, in their report, the identical words of the statute. But the *facts* required by the statute must be *fully* and *explicitly* stated, either in the terms used by the law itself, or in equivalent language, such as will convey distinctly the same idea.

2. The order appointing the commissioners authorizes them simply to "value the infants real estate." It may be well questioned whether such defect in the order of appointment

would be cured by a report subsequently made in conformity with the law, and approved by the court. The statute requires that they shall be appointed to perform certain prescribed duties. Here they were appointed to perform a part only of those duties, and in ascertaining and reporting other facts, they were acting outside of any authority conferred by the court. It is not necessary to decide this point, however, as the judgment and sale must be held void on the ground already noticed.

3. We are of opinion that the bond executed by the guardian, although informal in some respects, and containing some unnecessary stipulations, is in substantial conformity to the requirements of the statute.

Several other questions have been made in argument, which it is deemed unnecessary to notice specially.

The judgment is reversed, and the cause remanded with directions to sustain the motion of the appellants, and to vacate and set aside the judgment of sale, and all subsequent proceedings under it.

Barkley, &c. vs. Glover, &c.

CASE 11——JUNE 26.

APPEALS FROM THE SCOTT CIRCUIT COURT.

Barkley, &c. vs. Glover, &c.

Thomas vs. Farmers' Bank Kentucky.

Risk vs. Thomas.

Ford, &c. vs. Robinson.

Abbott vs. Wheat,

Ford vs. Robinson,

Glass vs. Clinton,

Forsee vs. Viley's Adm'r.

Featherston vs. Dickerson's Adm'r.

Kershaw, &c. vs. Prewitt's Trustees.

Same vs. Bailey, (of color.)

Hopkins vs. Harper.

Holley vs. Marvin.

Mallory vs. Emenal.

The 1st section of the act of May 24th, 1861, (*Session Acts*, page 2,) forbidding the rendition of judgments for money for the period therein named, is constitutional. The principles settled in the case of *Johnson vs. Higgins*, (3 *Metcalf*, 567,) holding it to be constitutional, are approved.

POLK and BUCKLEY, for appellants.

ROBINSON and JOHNSON, for appellees.

CHIEF JUSTICE STITES DELIVERED THE OPINION OF THE COURT:

These were judgments for money rendered in the Scott circuit court, whilst the act of May 24th, 1861, (*Sess. Acts*, p. 2,)

forbidding such judgments for the period therein named, was in force.

The cases are directly within the principle of *Johnson vs. Higgins*, (3 Met.. 567.) and except for the earnest argument in opposition to the ruling of that case, we should have contented ourselves with a reference thereto as conclusive of these.

It is again urged, as it was in that case, that that section of the bill of rights which declares "that all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law; and right and justice shall be administered without sale, denial, or delay," has been violated by the section of the act *supra*, which, in effect, as is said, retarded and delayed justice for the period during which it was in force.

The same views which were presented in the case *supra*, have been again pressed, and the same reply may be made to them. But here we have been referred to an authority, which was not cited upon the hearing of the other case. It is the case of *Bailey vs. Gentry*, (1 Missouri Reports, 172.)

The case involved the constitutionality of the Missouri stay law, which was in many respects similar to the Kentucky act of 1820, which was pronounced unconstitutional by this court in the cases of *Blair vs. Williams*, and *Brashear vs. Lapsley*, (4 Littell.) The Missouri court held the law unconstitutional, because (1) it impaired the obligation of contracts, and (2) because it operated to delay justice, and was, therefore, in violation of the section of the bill of rights of that State, which is substantially similar to that section of our bill of rights, which has been mentioned.

An attentive examination of the case has led us to the conclusion that the last ground upon which the decision was made to rest, was not necessary, nor warranted, either by the section of the Missouri bill of rights or the reasoning of the court upon which it was founded.

The doctrine that the section referred to applies alike to the legislative and judicial branches of the government is, in our judgment, directly opposed to the meaning and language of the section. This, we think, is rendered perfectly obvious by

reading it. The courts form its sole subject matter, and every part and parcel of the section relates directly to some duty of that branch of the government.

It is worthy of remark, in this connection, that in the cases of *B'air vs. Williams* and *Lapsley vs. Brashear*, *supra*, in which an act similar to the Missouri act was pronounced unconstitutional, it is not even intimated by this court, in either case, that the section of the bill of rights in the constitution of 1799, which is, word for word, like that in the constitution of 1850, and now before us, was in anywise invaded by the law then considered. Certainly something would have been said in reference to that section, if it had been deemed at all involved in the cases; for, as is well known, the controversy respecting that law was one of unusual interest and magnitude.

We may add, too, that in our researches for authorities upon this question, except the case from Missouri *supra*, we have been unable to find even a reference to any, in point, but one, the principle of which is thus stated in the 1st vol. *U. S. Dig.*, page 555. "The Georgia statute 'to alleviate the condition of debtors, and afford them temporary relief,' which enacted that the courts should not 'issue process in any civil case except for the trial of the right of property real and personal,' for a definite period, was held not to impair the obligation of contracts, nor take away the trial by jury." *Grimball vs. Ross*, *Charlton*, 175.

The volume of reports containing this case is not within our reach, and the reference is made not as authority, but only for the purpose of showing that the same question has been decided by the Georgia courts differently from the ruling of the Missouri case.

In regard to the constitutional right of the legislature to enact the section of the act in question, and as to its effect in impairing the obligation of contracts, it is deemed sufficient to say that both these points were fully argued and considered in the case of *Johnson vs. Higgins* *supra*, and we have seen no valid reason for departing from the conclusions therein stated.

Wherefore, the said judgments are reversed, and causes remanded for further proceedings not inconsistent herewith.

CASE 12—PETITION ORDINARY—JUNE 26.

Barbaroux vs. Barker.

APPEAL FROM JEFFERSON CIRCUIT COURT.

4me 47
94 109
4me 47
106 488

4me 47
122 814

1. A reply to a counter-claim or set-off may contain any matter of avoidance which might, under the former system of pleading, have been set forth by replication, provided it is not inconsistent with the petition.

2. When a reply contains matter inconsistent with the petition, the defendant should object to the filing of it, or move to strike out the inconsistent matter. If he fail to do so he cannot raise the objection in the court of appeals.

3. Two persons, mutually indebted to each other, executed each to the other his notes of hand for the full amounts of their respective indebtedness, with the understanding between them that the notes might be used to pay precedent debts, or for raising money by negotiation. One of the payees assigned one of the notes, and failed. In a suit by the assignee against the payor he pleaded a note of the same date executed to him by the assignor, as a set-off. *Held*, That the set-off cannot be allowed.

4. In such case the payor is bound, because his plea of a want or failure of consideration would be a fraud upon the holder. The principle applies to every case in which the note has been given to enable the payee to raise money or pay his debts. The fact that the payor had some additional motive for giving the note, concerning which he has been disappointed, cannot justify him in defrauding the holder.

PITTLE & ROBERTS, and WALKER MORRIS, for appellant, cited *Civil Code*, sec. 133 ; 16 *B. Mon.*, 201 ; 6 *J. J. Mar.*, 129 ; 2 *B. Mon.*, 290 ; 16 *B. Mon.*, 201.

G. A. & I. CALDWELL, for appellee, cited 13 *B. Mon.*, 391 ; 16 *Id.*, 575 ; 14 *Id.*, 352 ; 10 *Id.*, 268 ; *Story on Prom. Notes*, secs. 194, 195.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Barker sued Barbaroux upon his note for \$200, dated January 6, 1860, payable ninety-five days thereafter, to the order of E. Holbrook, and assigned by him to Durkee, Heath & Co., and by them to Barker.

Barbaroux answered, pleading as a set-off Holbrook's note to him for \$504, dated January 6, 1860, and payable four months after date.

Barker filed a reply, stating that on the 6th January, 1860,

Holbrook and Barbaroux met and stated accounts, by which it appeared that Holbrook's account against Barbaroux amounted to \$2 519.43, and Barbaroux's account against Holbrook to \$1,309.23; that, instead of settling the balance due to Holbrook, Barbaroux gave his notes to Holbrook, for \$2,519 43, including the one sued upon, and Holbrook gave his notes to Barbaroux for \$1,309.23, including the one pleaded as a set-off; that they gave said notes to each other "for the purpose of financiering and raising money thereon;" that it was expressly agreed that Holbrook might sell and use said notes in his business, to any person, or at any place, except at five banks named in the reply; and that, soon afterward, and before the note sued on matured, Holbrook assigned it to Durkee, Heath & Co., in payment of a debt he owed them, and that they received it without notice of the alleged set-off.

Upon the trial, Holbrook, having been released from liability as endorser, proved the facts above mentioned, and also proved that when the notes were executed Barbaroux wrote and handed to him a memorandum saying: "you can use my notes anywhere (if you can,) except at Quigley, L. & Co., Shreve & Tucker's, Bank of Ky., Bank L., and Northern Bank." A few days after transferring said note Holbrook failed in business.

The law and facts having been submitted to the court, a judgment was rendered against Barbaroux for the amount of the note sued on, from which he appealed.

1. It is contended that the new matter set forth in the reply is inconsistent with the petition, and that the reply is therefore fatally defective under *section 138 of the Code*, which authorizes a plaintiff, in his reply, to "allege, in concise language, any new matter not inconsistent with the petition, constituting a defense to the counter-claim or set-off."

In our opinion this objection cannot prevail. The matter of the reply is supplemental to the petition, and not at all inconsistent therewith. Under the old practice supplemental matter, in avoidance of a plea, was set forth in a reply, and not by amending the declaration; for example, to a plea of infancy or of the statute of limitations, a promise, after the infant

became of age, or during the period of limitation, was set forth by replication. Now, in such cases, the Code does not authorize a reply, but it permits a reply to a counter-claim or set-off; and the reply may contain any matter of avoidance which might formerly have been set forth by replication, provided it is not inconsistent with the petition.

Moreover, if the reply had contained matter inconsistent with the petition, the defendant should have objected to the filing of it, or have moved to strike out the inconsistent matter; and having failed to do so, he cannot raise the objection here.

2. As the evidence authorized the inference, that Holbrook, as between him and Barbaroux, had a right to use the notes to pay precedent debts, or for raising money by negotiation, we are not able to perceive any material distinction between this case and that of *Gano vs. Finnell*, 13 B. Mon., 390.

In such cases the payor is bound, because his plea of a want or failure of consideration would be a fraud upon the holder. The principle applies to every case in which the note has been given to enable the payor to raise money or pay his debts. The fact that the payor had some additional motive for giving the note, concerning which he has been disappointed, cannot justify him in defrauding the holder.

If the note, in *Gano vs. Finnell*, had been given, as contended by counsel, for the sole purpose of enabling the payee to raise money, and without any other consideration, the law would have implied a contract on the part of the payee to indemnify the payor, which would have been as binding as an express contract to pay the amount of the note to the payor in money or property. Yet it is conceded that in such cases the payor is bound to a *bona fide* holder, though not indemnified by the payee. But in *Gano vs. Finnell* the note was given, not merely to enable the payee to raise money, but under an agreement, that, before its maturity, the payee should furnish its value in whiskey to the payor, if he should elect to take the same, and if he should elect not to take the whiskey then that the payee should take up the note. The payor elected to

Metcalf's Executrix vs. Poindexter's Executrix.

take the whiskey; the payee failed to deliver it, or to take up the note; and yet the payor was held liable to the holder.

Conceding therefore that the note sued on was given by Barbaroux to enable Holbrook to raise money or pay debts, and in consideration of Holbrook's note to him for a similar amount, our opinion is that Barbaroux cannot set-off the latter note against the former.

3. But to the extent of \$1,210.23, being the balance due to Holbrook, there was a valid consideration for Barbaroux's notes. How many of the notes Holbrook negotiated does not appear by averment or proof. We cannot assume that he negotiated any except the one sued on by Barker. If he negotiated none other, or not more than amounted to \$1,210.23, Barbaroux has no defense to the note sued on even as against Holbrook.

The judgment is affirmed.

CASE 13—PETITION ORDINARY—JUNE 27.**Metcalf's Executrix vs. Poindexter's Executrix.**

APPEAL FROM JEFFERSON CIRCUIT COURT.

1. An instrument in writing recites that "for the satisfaction and security of J. M." it proceeds to "re-state" a subsisting parol agreement or understanding, the substance of which is set forth in the instrument. *Held*, that the writing is a covenant, binding as such on the parties, and not a mere memorandum of the prior parol agreement.

2. All written contracts are, in a certain sense, but *re-statements* of a pre-existing parol agreement between the parties. And the mere fact that the written memorial contains such a recital, cannot operate so to change the character and legal effect of the instrument as to reduce it from the grade and dignity of a covenant.

Metcalf's executrix sued Poindexter's executrix upon the following instrument, as a covenant:

Metcalf's Executrix vs. Poindexter's Executrix.

"LOUISVILLE, June 9th, 1847.

"For the satisfaction and security of Joseph Metcalfe, in relation to repairs done on the Oakland property, of which he is the proprietor under lease from me, I hereby restate what has been the understanding since the volunteer militia, mustered into the United States service, who were encamped on said property, under contract with the Quarter Master of the troops so encamped, that all such repairs as have been done under the superintendence of said Metcalfe, (since the removal of said troops, in order to restore the property to the like condition in which it was before said encampment,) shall be a charge on such repairs and improvements as may have been made under the superintendence of said Metcalfe, on the amount which the Government of the United States may allow (under the contract aforesaid, for the encampment of said troops,) and the damages consequent thereon, to be paid to said Metcalfe so soon as the same is allowed and paid by the government, to the extent of his expenditures in making said repairs.

"Teste : GEO. HANCOCK."

GEO. POINDEXTER."

The plaintiff sought to recover \$1,137 91, which it was alleged Metcalfe had expended in making said repairs, and averring that the government of the United States had paid to Poindexter \$1,500, for the encampment of said troops and the damages consequent thereon. More than five years had elapsed after the cause of action accrued before this suit was brought. The defendant pleaded the statute of limitations. The plaintiff demurred to the answer. The demurrer was overruled. Judgment was given for the defendant, and the plaintiff prosecutes this appeal.

T. A. MARSHALL, for appellant, cited 1 *Digest Ky. Rep.*, page 386; 2 *Bibb*, 614; 3 *A. K. Mar.*, 284; 2 *Bibb*, 465; 4 *Mon.* 462; 1 *A. K. Mar.*, 475; 3 *Mon.*, 22.

S. S. BUSH, on same side, cited 1 *Mar.* 314; 3 *Dana*, 483; 1 *J. J. Mar.*, 411; 11 *B. Mon.*, 312; 2 *J. J. Mar.*, 129; 2 *Cowen*, 195; 8 *Mass.*, 214; 10 *Ib.*, 379; 11 *Ib.*, 302; 11 *Pick.*, 154; 4 *Dal.*, 345; 2 *Shepley*, 233; 19 *Maine*, 394; 11 *Vermont*, 493; *Chitty on Contracts*, pages 74, 97, 84.

W. S. BODLEY and P. B. POINDEXTER, for appellee, cited 13 *B. Mon.*, 475; 1 *Mur.*, 422; 12 *B. Mon.*, 470; 5 *J. J. Mar.*, 32; 11 *B. Mon.*, 312; *Angell on Limitation*, sec. 92, and notes; 2 *Bacon's Abr.* 558, *Covenant, B.*

JUDGE DUVALL DELIVERED THE OPINION OF THE COURT:

We are of opinion that the writing on which the present action is founded is a covenant, and was so intended by both the parties.

There had been a parol agreement, (or understanding,) between Poindexter and Metcalfe, in relation to certain repairs done by the latter on the Oakland property. That agreement not having been altered or satisfied, subsisted at the time of the execution of the writing. It existed in parol merely, but was in full force, and was obligatory between the parties. For the purposes declared in the writing—that is to say, “for the *satisfaction* and *security* of Joseph Metcalfe”—Poindexter proceeds to “*re-state*” in writing the pre-existing parol agreement or understanding, the substance of which was, as set forth in the instrument, that the repairs on the property which had been made or superintended by Metcalfe, should be a charge on the amount which the government might allow, under the contract as recited, and the damages resulting from the occupation of the property by the troops, “to be paid to said Metcalfe so soon as the same is allowed and paid by the Government.”

Such are, substantially, the terms and stipulations of the contract as set forth or *re-stated* in the instrument sued on. The object of making this written re-statement appears on the face of the instrument, and is forcibly, indeed we might say, conclusively illustrative of the motives and intentions of the parties in its execution. That object was “the *satisfaction* and *security* of Joseph Metcalfe.” Now it occurs to us, that in view of all the circumstances surrounding the parties at the time, the execution of the writing would have afforded Metcalfe very little *satisfaction*, and no *security* at all, except on the assumption that it was intended to merge the subsisting parol agreement into the written covenant. All written contracts

are, in a certain sense, but re-statements of a pre-existing parol agreement between the parties. And the mere fact that the written memorial contains such a recital, cannot operate so to change the character and legal effect of the instrument as to reduce it from the grade and dignity of a covenant to a mere *memorandum* of the prior agreement.

We think it clear, on the face of the writing itself, that it was delivered on the one hand, and accepted on the other, as a covenant binding as such on the parties.

This view of it is sustained by ample authority. (2 *Bibb*, 614; 3 *A. K. Marshall*; 4 *Mon.*, 402; 1 *A. K. Marshall*, 475; 3 *Mon.*, 22.)

It will be found, upon an examination of the cases relied on by the appellee, that they do not conflict with the principle settled in the cases above referred to.

The judgment is reversed, and the cause remanded with directions to sustain the demurrer to the plea of the statute of limitations, and for a new trial and further proceedings not inconsistent with this opinion.

CASE 14—PETITION ORDINARY—JUNE 27.

Mallory & Co. vs. Hiles.

APPEAL FROM SCOTT CIRCUIT COURT.

1. An act of the General Assembly, which provides that it shall take effect from its passage, takes effect on the day of its approval by the Governor. and must be regarded as being in force during the whole day upon which it is approved, in conformity to the general rule that where a computation is to be made from an act done, the day upon which the act is done is to be included.

2. A judgment was rendered on the 24th day of May, 1861, for debt due by note, the same day on which the Governor approved the act, entitled, "an act to suspend the circuit and other courts in this commonwealth, and for other purposes," by which the rendition of such judgments was prohibited from the passage of the act until the 1st day of January, 1862. It did not appear at what hour the act was ap-

4me	53
105	687
105	814
4me	53
137	728

Mallory & Co. vs. Hiles.

proved, nor at what hour the judgment was rendered. *Held*, That the judgment was improperly rendered, because the act was in force during the whole of the day.

POLK & BUCKLEY, for appellants, cited 13 *B. Mon.*, 460; 1 *Met.*, 543; *Johnson vs. Higgins*, 3 *Met.*; *Offutt vs. Owens*, *Miss. opin.*, *Winter term*, 1861.

MILTON STEVENSON, for appellee, cited *Civil Code*, secs. 577, 578; 1 *Met.*, 18, 20; *sess. acts, called session of 1861*, page 2.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The appellee obtained a judgment against the appellants for \$170, due upon a note. The judgment was rendered on the 24th day of May, 1861, the same day on which the Governor approved the act, entitled, "An act to suspend the circuit and other courts in this commonwealth, and for other purposes," by which the rendition of such judgments was prohibited from the passage of the act until the 1st day of January, 1862, as was decided in the cases of *Johnson vs. Higgins*, 3 *Met.*, 566, and many subsequent cases. It does not appear at what hour the act was approved, nor at what hour the judgment was rendered.

It is contended—1st. That the act took effect from the day of its approval, and therefore was not in force on the 24th of May. 2nd. That, if it took effect on the 24th of May, yet it only took effect at the moment of its approval; and as it is not shown at what time of the day it was approved, it should be presumed, in favor of the jurisdiction of the court below, that it was not approved until after the rendition of the judgment.

As it was declared in the act that it should take effect from its passage, we do not perceive any ground for holding that it did not take effect until the day after its passage; nor have we found any authority sustaining that view. Our opinion is, that it took effect on the 24th of May.

If, for this purpose, a day is capable of division, so as to give effect to a statute only from the moment of its approval, there would be much reason for contending that the judgment in this case should be affirmed, upon a presumption that it was rendered before the act was approved. Upon the question whether an act, which is to take effect from its passage,

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should be regarded as being in force during the whole day upon which it is approved, or only from the moment of its approval, there has been some difference of opinion, as is shown by the very able discussions of Judge Story, in the matter of Joseph Richardson and another, (6 *Law Reporter*, 392,) and of Judge Prentiss in the matter of Dehies Welman, (7 *Law Reporter*, 25.) In our opinion, according to the weight of reason, and the decided weight of authority, the act in question must be regarded as having been in force during the whole of the day upon which it was approved, in conformity to the general rule, that where a computation is to be made from an act done, the day on which the act is done is to be included. (*Arnold and others vs. the United States*, 9 *Cranch*, 104; *In re Welman*, *supra*; *Chiles vs. Smith's heirs*, 13 *B. Mon.*, 460; *Batman vs. Megowan*, 1 *Met.*, 533.)

The Revised Statutes require *the day* of the approval of an act of Assembly by the Governor, to be stated at the end of the same, (*chap. 61, sec. 4.*) Such was the practice before. If the Legislature had contemplated that statutes, which were to take effect from their passage, should take effect only from the moment of approval by the Governor, they would no doubt have required the hour, as well as day of approval to be stated.

The judgment is reversed, and the cause remanded for further proceedings.

CASE 15—ATTACHMENT—JULY 1.

Leet vs. Lockett.

APPEAL FROM MC'LEAN CIRCUIT COURT.

1. The *Revised States*, *chap. 56, art. 2, sec. 6*, provides that upon the return of an attachment for rent issued by a justice of the peace, to the circuit court, "the pro-

Leet vs. Lockett.

ceeding shall be the same as on other common law attachments." This must be construed as referring to attachments then authorized by the *Code of Practice*, title 8, chapter 3. An order discharging such attachment, on motion, upon the ground that it was obtained upon an insufficient affidavit, is not a final order from which an appeal can be prosecuted. The party desiring a reinstatement of the attachment should obtain leave and apply to a judge of the court of appeals. (*Original Code*, secs. 306 to 309)

2. How a valid statutory bond to perform the judgment of the court in an attachment case may be enforced.

W. T. OWEN, for appellant, cited *Rev. Stat.*, chap. 56, art. 2, sec. 5; *Civil Code*, secs. 242, 243; 2 *Met.*, 445.

JOHN M. HEWITT, for appellee, cited sec. 5, art. 2, chap. 56, *Rev. Statutes*.

JUDGE BULLITT, DELIVERED THE OPINION OF THE COURT:

Leet obtained an attachment from a justice of the peace, upon an affidavit that Lockett owed him \$100 for rent, then due, and had within fifteen days removed, or was then removing his property from the leased premises. The attachment was returned to the circuit court, and on the motion of Lockett was discharged at the costs of Leet, because the affidavit failed to state the affiant's belief, that "unless the attachment be issued he will lose his rent," as required by the statute. (*Rev. Stat.*, chap. 56, art. 2, sec. 5.) From that judgment Leet appealed.

In our opinion this court has no jurisdiction over the case. The statute provides, that, upon the return of an attachment for rent to the circuit court, "the proceedings shall be the same as on other common law attachments." (*R. S.*, chap. 56, art. 2, sec. 6.) This must be construed as referring to attachments then authorized by the Code of Practice, because, when the Revised Statutes were enacted, no attachments could be issued from the circuit courts except those authorized by the code. (title 8, chap. 3.) Under the code, the order discharging the attachment was not a final order, from which an appeal can be prosecuted. Leet, if he desired a reinstatement of the attachment, should have obtained leave and applied to a judge of this court. (*Original Code*, secs. 306 to 309.)

But it is contended that the court below erred in failing to

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give the appellant a judgment on a bond alleged by counsel to have been given by the appellee and another for the performance of the judgment of the court as authorized by the code. (*Original Code, sec. 263.*)

We need not decide whether or not the bond in question was executed in the manner required by the statute. (*Original Code, sec. 263.*) If it was so executed as to be a valid statutory bond, the appellant might have enforced its performance by rules and proceedings as in cases of contempt. (*Original Code, sec. 304.*) But the record does not show that any rule had been issued against the appellee, nor that the appellant had moved for a judgment against him on the bond. As to the appellant's right to such a judgment, there was no decision by the court below and can be none here upon this appeal. There has been no judgment in the case except the one discharging the attachment at appellant's cost.

Wherefore the appeal is dismissed.

CASE 16—PETITION ORDINARY—JULY 1.

True, &c. vs. Triplett,

APPEAL FROM MASON CIRCUIT COURT.

1. The payor of a note, when sued by an assignee, has not merely an equitable, but a legal right to avail himself, as matter of defense, of any usury embraced in the note, or of any payments made to the payee before notice of the assignment.

2. If an answer presents merely matter of *defense*, it cannot be treated as a set-off or counter-claim, though it may be so called by the defendant.

3. Payor of a note, sued by assignee of payee, pleads certain payments to payee before notice of the assignment, as a set-off, and usurious interest embraced in the note, as a counter-claim. *Held*, That the answer presents only matter of defense, and no reply is necessary; and that the assignor is not a necessary party to the controversy between the payor and assignee.

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STANTON & TROOP, for appellants, cited *Civil Code*, sec. 183; 7 *Barbour, N. Y.*, 80; 10 *Barbour Supreme Court R.*, 321; 8 *Barb.*, 124; 18 *B. Mon.*, 60; *Ib.*, 82; *Smith vs. Lewis, Mss. opin.* 1855.

HARRISON TAYLOR, for appellee, cited *Civil Code*, sec. 903.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The appellee, as assignee of Jennings, sued the appellants upon a note. T. M. True filed an answer, alleging that he had made certain payments to Jennings, before notice of the assignment, and also that a certain amount of usurious interest was embraced in the note, and concluded the answer thus: "He pleads and relies on the foregoing payments as set-off herein, and said usury as a counter-claim, wherefore he prays judgment, &c." The appellee replied, denying any knowledge of the facts alleged by appellants, or information sufficient to form a belief concerning them; and praying that Jennings might be made a party to the suit, and for judgment against him for the amount, if any, which might be credited to the appellants on account of the alleged usury. But Jennings was not brought before the court.

The law and facts were submitted to the court, and judgment rendered against appellants for the amount of the demand, from which they appealed.

The record contains no bill of exceptions. The only grounds relied on for a reversal are: 1. That Jennings was a necessary party to the suit. 2. That the reply was insufficient.

Under the statute, the payor of a note, when sued by an assignee, has not merely an equitable, but a legal right, to avail himself, as matter of defense, of any usury embraced in the note, or of any payments made to the payee before notice of the assignment. It is clear, therefore, that Jennings was not a necessary party to the controversy between the appellants and appellee.

The alleged payments to Jennings, and the alleged usury, constituted matter of defense and not of set-off or counter-claim against the appellee. It has been repeatedly decided by this court that, if an answer states facts, constituting a set-

off or counter-claim, it must be regarded as a counter-claim or set-off, though not so denominated in the answer. On the other hand, if the answer presents merely matter of defense, our opinion is that it cannot be treated as a set-off or counter-claim, though it may be so called by the defendant. As the answer of T. M. True presented only matters of defense, no reply was necessary.

The judgment is affirmed.

CASE 17—PETITION EQUITY—JULY 2.

Ward vs. Crotty, &c.

APPEAL FROM FLEMING CIRCUIT COURT.

1. The release by a wife of her potential right of dower forms a valuable consideration, sufficient to sustain a settlement upon her by her husband, even against his creditors.

2. An agreement by a husband to transfer to his wife a note, for a part of the purchase money, for her separate use, in consideration of her release of her potential right of dower in land sold by him, is binding in equity, and may, upon her application, be specifically enforced against him.

3. Between equities that which is prior in time must prevail.

4. Section 11, of chap. 24, of the Revised Statutes, does not avoid an unrecorded assignment in behalf of creditors having notice thereof before the acquisition of a legal title to the property. (17 B. Mon., 625.)

5. A husband sold land in which his wife had a potential right of dower, which she refused to release unless he would give her one of the notes which he had taken from the purchaser. He agreed to assign the note to her for her separate use, and delivered it to her, endorsed, "I assign the within note to C. W., [the wife,] for satisfactory consideration." No trustee was named, nor was the assignment recorded. She then signed and acknowledged the deed. Afterwards his creditors sought to subject the note, when she asserted her claim thereto. *Held*, That against the subsequent creditors she is entitled to the note. Against the prior creditors she is entitled to the value of her potential right of dower at the time she released it, with interest; the residue, if any, due upon the note, to go to the prior creditors.

ANDREWS & COX, for appellant, cited 5 B. Mon., 298.

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WM. S. BOTTS, for appellees, cited 2 *J. J. Mar.*, 82; 18 *B. Mon.*, 332; 7 *Pick.* 533.

W. H. CORD, on same side, cited *Marshall vs. Hutchins*, 5 *B. Mon.*; *McCann vs. Letcher*, 8 *B. Mon.*; *Hunt vs. Dupuy*, 11 *B. Mon.*, 285-6; *Bullard vs. Briggs*, *Pick. Mass. Rep.*; *Fassett vs. Fleming*, *Ms. opin. summer term*, 1856.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Thomas Ward, owning land in which his wife, the appellant, had a potential right of dower, agreed to sell it to one Hudson for \$1,156; Hudson to pay \$300 down, and to give his three notes for \$285.66 each for the residue.

The conveyance having been prepared, the clerk of the county court, at the request of Ward and Hudson, called on Mrs. Ward to sign and acknowledge it; but she refused to do so, unless Ward would give her one of said notes. Ward then agreed to assign said note to her for her separate use, and delivered it to her with this endorsement: "I assign the within note to Catharine Ward for satisfactory consideration. Dec. 29, 1859. Thomas Ward."

After the note had been delivered to her, she signed and acknowledged the deed.

In 1861 Crotty and other creditors of Ward obtained attachments against his property, upon affidavits authorizing such proceedings, and sought to subject the note assigned to Mrs. Ward.

She, by answer and cross-petition, asserted her claim to said note, and alleged and proved the facts above stated. The court below dismissed her cross-petition, from which order she appealed.

That the release by a wife of her potential right of dower forms a valuable consideration, sufficient to sustain a settlement upon her by her husband, even against his creditors, is too well settled to require any citation of authorities.

It is contended that the judgment should be affirmed because the assignment of the note was not made to a trustee for Mrs. Ward, nor expressed to be for her separate use; and also because the assignment was not recorded.

We are satisfied that Ward's agreement to transfer the note for the separate use of his wife, was binding in equity, and might, upon her application, have been specifically enforced against him. (*Livingston vs. Livingston*, 2 *John. C. R.*, 537; *Garlick vs. Strong*, 3 *Paige*, 440; *Marshall vs. Hutchinson*, 5 *B. Mon.*, 298; *McCann vs. Letcher*, 8 *B. Mon.*, 320; *Athurly on Marriage Settlements*, 161; 2 *Kent's Com.*, 166.

The creditors, by their attachments, acquired only an equitable claim upon the note. Her equity being prior to theirs must prevail.

Whether or not section 11, chapter 24, of the Revised Statutes, applies to an assignment of a chose in action, or a conveyance to a married woman for her separate use, we need not decide; because, even conceding that it does, the statute does not avoid an unrecorded assignment in behalf of creditors, having notice thereof before the acquisition of a legal title to the property. (*Forepaugh vs. Appold*, 17 *B. Mon.*, 625.)

It appears that some of Ward's debts were contracted before the assignment, and some afterwards. Against the subsequent creditors Mrs. Ward is entitled to the note. Against the prior creditors she is entitled to the value of her potential right of dower, at the time she released it, with interest. The residue, if any, due upon the note, should, if necessary, go to Ward's prior creditors. (*Garlick vs. Strong*, *supra*.)

The judgment is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

June 61
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CASE 18—PETITION EQUITY—JUNE 4.

Watts, &c. vs. Pond, &c.

APPEAL FROM MADISON CIRCUIT COURT.

1. In a proceeding for the sale of infants' real estate under the statute, the record must show that the commissioners, appointed to report the net value of the infants'

Watts, &c. vs. Pond, &c.

estate, &c., were sworn; otherwise the court has no jurisdiction to order a sale, and the sale, if made, will be void.

2. The report of the commissioners must show whether the interest of the infants requires the sale to be made, or the sale will be void. It will not be sufficient to state that in their opinion "it would redound to the benefit of the said infants to have said land sold."

SQUIRE TURNER, for appellants, cited *Rev. Statutes*, (old edition,) page 592; 16 *B. Mon.*, 295; 18 *Ib.*, 781; 2 *Met.*, 514.

C. F. BURNAM, for appellees, cited *Morehead & Brown's Digest*, 808; *Civil Code*, secs. 98, 97.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the circuit court, overruling a motion to quash a sale of infants' lands, and the bonds for the purchase money given by the appellants.

The record of the proceeding, in which the sale was ordered, does not show that the commissioners, appointed to report the net value of the infants' estate, &c., were sworn. Their report states that, in their opinion, "it would redound to the benefit of the said infants to have said land sold."

The statute declares that, "before a court shall have jurisdiction to decree a sale of infants' lands, three commissioners must be appointed to report, and must report under oath, to the court, the net value of the infants' real and personal estate, and the annual profits thereof, and whether the interest of the infant or idiot requires the sale to be made." (*R. S.*, chap. 86, art. 3, sec. 2.)

In this case the court had no jurisdiction to order a sale; *first*, because the report did not state whether the interest of the infants required the sale to be made; (*Mattingly vs. Read*, decided at the last term;) *secondly*, because the commissioners did not report under oath, as required by the statute. The sale was, therefore, void, and the motion should have been sustained.

The judgment is *reversed*, and the cause remanded for further proceedings consistent with this opinion.

DECISIONS
OF
THE COURT OF APPEALS
OF KENTUCKY.

WINTER TERM, 1862.

CASE 1—MOTION—DECEMBER 3.

City of Louisville vs. Commonwealth.

APPEAL FROM THE FRANKLIN CIRCUIT COURT.

1. The liability of the city of Louisville to the commonwealth for the \$2,000 per annum required by the act of March 10, 1856, to be paid into the treasury, in consideration of the fines and forfeitures recovered in favor of the commonwealth in the city court of Louisville, is that of a debtor to the commonwealth, not that of a collector or receiver of public moneys; and judgment cannot be obtained therefor without notice of the motion.

2. Section 1, of article 12, chapter 83, of the Revised Statutes, has been superceded by the provisions of the Civil Code, which prescribes the remedies against defaulting collectors and receivers of the public moneys.

3. See the opinion for a reference to the laws relating to the questions *supra*.

WM. S. BODLEY, for appellant, cited *act March 10, 1856, (sess. acts 1855-6, page 114;) Rev. Stat., art. 12, chap. 83, sec. 1; 9 Dana, 70.*

A. J. JAMES, Attorney General, for commonwealth, cited *act March 10, 1856, (1 sess. acts, 1855-6, page 114;) act of Dec. 21, 1861, Gen. Laws, 43; 2 Rev. Stat., 268; 5 Mon., 319.*

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JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

By an act approved March 10, 1856, it was provided that, "The judge of the city court of Louisville shall receive an annual salary of \$2,000, payable out of the treasury of this commonwealth, quarterly. And in consideration of the fines and forfeitures recovered in favor of the commonwealth, in said court, granted to the city of Louisville, it shall be the duty of said city, on the 1st day of December next, and on the 1st day of December in each succeeding year, to pay into the treasury of this commonwealth the like sum of \$2,000. (*Sess. acts, 1855, vol. 1, page 114.*)

In March, 1862, the Attorney General filed in the Franklin circuit court this memorandum of the Auditor of Public Accounts:

" FRANKFORT, Feb., 26, 1862.

CITY OF LOUISVILLE,

In account with the Commonwealth of Kentucky, Dr.

To three years salary of city judge, from 1st December, 1858, to 1st December, 1861, per act of General Assembly, approved 10th March, 1856, \$6,000."

On the same day, without any summons of, or notice to, or appearance by the city, a judgment by default was rendered against it in favor of the commonwealth for \$6,000, with interest and 20 per cent. damages, from which it appealed.

The Code provides, that "all debts due to the Commonwealth of Kentucky are recoverable by motion in the Franklin circuit court." (*Sec. 485.*)

Section 486 declares that, "where the debt is due by a sheriff, clerk, or collector of the revenue, or any other receiver of public moneys, for money collected or received, and such officer, collector, or receiver has failed to pay the same, in the manner and at the time prescribed by law, the motion for the recovery of such debt may be made at the regular term of said court succeeding such failure, without any notice to such debtor or his sureties."

Section 487 authorizes similar proceedings against officers, corporations, and officers of corporations, failing to report as required by law, where a fine or penalty is imposed for such failure.

Section 488 declares that, "in all other cases notice of such motion shall be served on the debtor, or person in default, ten days before the making thereof."

By an act approved Dec. 21, 1861, sections 486 and 487 were amended so as to authorize the motions, therein mentioned, to be made at the first, or any subsequent term, without notice. (*Public acts, regular session, 1861, page 43.*)

Sec. 1, art. 12, chap. 83, of the Revised Statutes, need not be considered, having been superceded by the provisions of the Code.

The only question necessary to be considered is, whether section 486 of the Code, as amended by the act of 1861, authorized the rendition of judgment, in this case, without notice to the appellant. In our opinion it did not.

Assuming, as is conceded by appellant's counsel in argument, that appellant is liable to the commonwealth for the said sum of \$2,000 per annum, by virtue of the act of 1856, we are clearly of the opinion that the liability is not embraced by section 486 of the Code. That section applies only to agents of the commonwealth, collecting or receiving for it moneys to which it is entitled. The act of 1856 makes it the duty of the city to pay money to the commonwealth, not to collect money for the commonwealth. It authorizes the city to collect the fines and forfeitures, recovered in the city court, for itself, not for the commonwealth. The liability of collectors and receivers of public moneys depends upon the sums which have or might have been collected; that of the city is fixed at a certain sum, without reference to the amount of the fines and forfeitures which may be collected. Under the act of 1856, said fines and forfeitures are not "public moneys," do not belong to the commonwealth, and are not collected for it, but belong to appellant, and appellant is not bound to pay the same, nor to account therefor to the commonwealth. The liability of the city is that of a debtor to the commonwealth, not that of a collector or receiver of public moneys; and notice of the motion should have been given.

The judgment is reversed, and the cause remanded for further proceedings, not inconsistent herewith.

CASE 2—BASTARDY CASE—DECEMBER 9.

Chandler vs. Commonwealth.

APPEAL FROM THE MUHLENBURG COUNTY COURT.

1. Under the *Revised Statutes*, chapter 6, an appearance by a defendant is not necessary to authorize a trial of a bastardy case. It is not a criminal, but a civil proceeding.

2. Where a defendant in a bastardy case fails to appear, in compliance with his recognizance, the court is not thereby deprived of its jurisdiction over the case, but may give relief by trial and judgment against the defendant upon his failure to appear, and by an attachment to compel performance of the judgment.

3. That the father of a bastard child is an infant does not relieve him from a prosecution, under the statute, for its support. Infants are liable for their tortious acts. But a guardian *ad litem* should be appointed to defend him.

4. Under the provisions of the Civil Code a bastardy case is a special proceeding, and not an action. It is not for a penalty or forfeiture, nor is it for the enforcement of a private right within the meaning of the Code.

5. The defendant in a bastardy case is not entitled to a continuance on account of his absence as a soldier in the armies of this State and the United States. The acts of March 8, and March 11, 1862, are not applicable to proceedings in bastardy cases.

6. Evidence of a promise of marriage is not admissible on the trial of a bastardy case.

JOSEPH RICKETTS and B. E. PITTMAN, for appellant, cited 3 *Littell*, 284; *act of March 8, 1862*; 6 *J. J. Mar.*, 585; *Rev. Stat.*, chap. 6, sec. 10.

A. J. JAMES, Attorney General, for commonwealth, cited *act March 11, 1862*, page 69, *General Laws*.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

This is a proceeding against the appellant, who is under the age of 21 years, to compel him to support a bastard child, of which he is alleged to be the father. In May, 1862, he was arrested, and entered into a recognizance to appear in the Muhlenburg county court on the first day of its next June term. At that term he failed to appear, and his recognizance was declared forfeited, and, as the record states, the cause was continued "on the motion of the defendant by his attorney." At the July term the defendant again failed to appear and, as the

record states, B. E. Pittman, as his attorney, and Richard Chandler, as his agent, moved for a continuance, upon the ground, sustained by affidavits, that defendant was then, and for more than six months had been, a soldier in the army of the United States, and was then in the service of said army and absent from said county. But the motion was overruled, and, upon a trial, the jury found the defendant guilty, and the court, in accordance with the verdict, adjudged that he be charged with the annual sum of \$25 during the next eleven years, and that he should execute bond, with surety, therefor, on or before the second day of that term; and that defendant having failed to execute said bond, the court afterward ordered that he be committed to jail until he should execute such bond or pay the money, or be discharged as an insolvent debtor; to reverse which orders this appeal was prosecuted.

1. It is contended that the county court, upon defendant failing to appear, had no authority to do anything more than to take proceedings for enforcing a forfeiture of the recognizance; and that a new warrant and arrest were necessary to authorize a judgment against him for the support of the child. We are of a different opinion. It was his duty to appear as he had bound himself to do, and he could not, by failing to appear, deprive the court of its jurisdiction over the case. This is not a criminal, but a civil proceeding, the chief object of which is the benefit of the mother and child. (*Schooler vs. Commonwealth*, *Litt. Sel. Cas.* 91; *Hamilton vs. Same*, 3 *Mon.*, 214; *Burgen vs. Straughan*, 7 *J. J. Mar.*, 584-5.) Neither of them can have any benefit from the forfeiture of the recognizance; and if the defendant, by failing to appear, can deprive the court of its jurisdiction over the case, neither the mother nor child can have any benefit whatever from the proceeding, but a new proceeding must be instituted. True, final relief cannot be given unless the defendant shall appear or be arrested; but, in our opinion, if his presence had been deemed necessary to authorize a trial, the Legislature would, as in criminal cases, have authorized process to compel his appearance, upon his failing to appear in compliance with his recognizance. According to our view, the court may give re-

lief in such cases by trial and judgment against the defendant, upon his failure to appear, and, by an attachment, to compel performance of the judgment. But, according to the view urged by appellant's counsel, a defendant in a bastardy case may forever prevent the giving of any relief to the mother and child, because, as often as he is arrested, he may give a recognizance, in the sum of \$300, to appear, and then can end the proceeding by failing to appear. Finally, it must be remarked, that, though the framers of the Revised Statutes adopted most of the provisions of the bastardy act of 1795, (1 S. L., 238,) they omitted the following provision contained in that act: "And, on the person so charged with being the father of any bastard child appearing in court, such court shall proceed to hear and determine the charge against such person." In view of that omission, and of the other considerations above mentioned, we are clearly of the opinion that, under the *Revised Statutes*, chap. 6, an appearance by a defendant is not necessary to authorize a trial of a bastardy case.

2. It is contended that the appellant is not subject to the liabilities imposed by said statute, because he is an infant. According to the evidence he was in the 19th year of his age when the child was begot. It is not contended that he was incapable of begetting a child, but is insisted that the statute, though general in its terms, only applies to adult fathers. No authority is cited in support of this position; nor do we perceive any reason for excepting acts of this character from the operation of the general rule of law, which holds infants liable, like adults, for their tortious acts.

3. It is contended that the appellant was entitled to a continuance because he was a soldier in the army of the United States, then in the service, and absent from the county.

In our opinion he was not entitled to a continuance by virtue of the act entitled, "An act for the benefit of soldiers in the armies of the State of Kentucky and the United States," approved March 11, 1862, (*acts of regular session*, 1861, page 69,) for two reasons: 1st. That act only applies to "cases of prosecutions for crimes and misdemeanors," and this, as we have shown, is not such a case, but is in the nature of a civil

proceeding. 2ndly. That act only entitles the defendant to a continuance where he has volunteered and entered the military service since the commencement of the proceedings; whilst the evidence shows that the appellant entered the service before the commencement of this proceeding.

Nor was he entitled to a continuance by virtue of the act entitled, "an act to regulate proceedings in civil cases," approved March 8, 1862, (*acts of regular session, 1861, page 67,*) because that act only applies to "actions, either by ordinary or equitable proceedings," and this was not such an action. To ascertain what was an action by ordinary or equitable proceedings, when this act was passed, we must look to the Code of Practice. The preliminary provisions of the Code contain these provisions :

"§ 2. Remedies in civil cases in the courts of this State are divided into two classes—1. Actions. 2. Special proceedings.

§ 3. A civil action is an ordinary proceeding in a court of justice by one party against another, for the enforcement or protection of a private right, or the redress or prevention of a private wrong. It may also be brought for the recovery of a penalty or forfeiture.

§ 4. Every other remedy in a civil case is a special proceeding."

Title 1, section 3, declares that, "The proceedings in a civil action may be of two kinds: 1. Ordinary. 2. Equitable." And *chapter 4, section 28*, gives jurisdiction to the county court in certain "civil proceedings," including cases of bastardy. Under these provisions of the Code, the case under consideration is a special proceeding and not an action. It is clear that the liability imposed by the Revised Statutes upon the father of a bastard child, is not a forfeiture; nor is it a penalty, as was decided in the cases cited above. The right which it confers on the county courts to compel the father to keep, maintain, and educate the child, is not, in our opinion, a private right within the meaning of the Code; if it is, it is a right of the child, and not of the commonwealth, in the name of which the proceeding is carried on, nor of the mother at whose

instance it is prosecuted, and without whose consent it cannot be instituted. So that, at any rate, it is not "a proceeding by one party against another for the enforcement of a private right."

4. But, in our opinion, the court below erred in failing to appoint a guardian *ad litem* for the appellant. Though an infant may be held liable under the bastardy act, he must first be found guilty, and is entitled to the same protection with reference to the trial of the question, as in other civil cases. He cannot appoint an agent or attorney. He must be defended by a guardian *ad litem*.

5. The court below also erred in permitting the mother to testify that the defendant had promised to marry her, though the court, "in overruling the objection to the question, told the jury that the answer was admissible, but not for the purpose of increasing the damages against the defendant." If it had been admissible for any purpose, the jury should have been told what the purpose was. But, in our opinion, it was not admissible for any purpose. The child was equally a bastard whether it was begot with or without a promise of marriage; and the evidence of the promise may have prejudiced the minds of the jury, and caused them to increase the sum with which they charged the defendant, although they were told that the evidence was not admissible for that purpose.

The judgment is reversed, and the cause remanded for a new trial and other proceedings not inconsistent with this opinion.

CASE 3—FORFEITED RECOGNIZANCE—APRIL 10.

Commonwealth, (for Huker,) vs. Taphorn, &c.

APPEAL FROM THE KENTON CIRCUIT COURT.

The circuit court has no jurisdiction of an appeal from a judgment of the county court upon a forfeited recognizance for the appearance of a defendant in a bastardy case. An appeal from such judgment is exclusively cognizable by the court of appeals.

A. J. JAMES, Attorney General, for Commonwealth, cited
Civil Code, secs. 15, 16,

CAMERON and FISK, on same side.

CARLISLE, HAMILTON and CARLISLE, for appellees.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

Taphorn was accused by Theresa Huker of being the father of her bastard child. At the April term 1860, of the Kenton county court, he was put on trial, but the jury failing to agree, were discharged, and Taphorn, with the present appellees as his sureties, entered into a recognizance in the sum of \$300, "to be due upon the failure of said Clement Taphorn to appear at the next regular term of this court in Covington, to answer said charge." Such is the recital contained in the order of court, the recognizance bond not being in the record. At a subsequent term the recognizance was declared forfeited, and the sureties having been summoned, judgment was rendered against them for the \$300. They appealed to the Kenton circuit court, and that court rendered a judgment quashing the summons which had issued by order of the county court, and dismissing the case at the cost of the plaintiff. To reverse that judgment she has appealed.

The only question to be decided is whether the Kenton circuit court had jurisdiction of the appeal from the judgment of the county court.

The law has given to this court appellate jurisdiction over the final orders and judgments of all other courts of this com-

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monwealth, subject to certain exceptions. Among these exceptions is the class of cases in which the judgment or order is by the *county court*, and an appeal is given to the quarterly or *circuit court*. (*Code, sections 15, 16.*)

The cases in which appellate jurisdiction is given to the *circuit courts* over the final orders and judgments of the *county courts*, are enumerated in *section 20*. It will be seen at a glance that this enumeration does not embrace the present case, which is simply a personal judgment for money. An appeal from such judgment is therefore exclusively cognizable by this court.

It is obvious that the circuit court erred in assuming jurisdiction to render the judgment complained of, and it is therefore reversed, and the cause remanded with directions to dismiss the appeal.

CASE 4—MOTION—DECEMBER 6.

Chiles & Thomas vs. Monroe.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. Mere lapse of fifteen years and a few days, without execution upon a judgment, does not raise a presumption of payment.

2. The title of an act, passed in 1858, is, "An act to amend the *second section* of article sixty-three, of the Revised Statutes, entitled, 'limitation of actions and suits,' The act declared "that the provisions of chapter sixty-three, of the Revised Statutes, shall extend to and embrace all cases in which the right of action accrued, whether before or after the Revised Statutes took effect, from and after the first day of August, 1859." *Held* That the act, or so much of it as applies to any other subject than that expressed in the title, is unconstitutional, inoperative and void.

3. In Sept. 1839, a judgment was rendered, on which an execution soon afterwards issued, and was returned, "No property found." A second execution issued in July, 1846, which, in September following, was also returned, "No property found." No other step occurred until Oct. 8th, 1861, when a third execution was sued out, which the defendant moved to quash, relying upon presumption of pay-

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ment and limitation. *Held*, That the facts do not raise a presumption of payment, and that at the time this proceeding was commenced, there was no statute of limitation in force applicable to the judgment on which the execution issued.

JOHN M. HEWITT, for appellants, cited 3 *Met.*, 258 ; *Civil Code*, 1st edition, sec. 409 ; 3 *Blackstone*, 160 ; *Constitution Ky.*, 20th section of *Bill of Rights*; 9 *B. Mon.*, 489 ; 1 *Litt.*, 331 ; 4 *Ib.*, 37, 38, 39, 56.

SIMPSON & SCOTT, on same side, cited *Littell's Selected Cases*, 348-9 ; 6 *J. J. Mar.*, 51 ; 9 *B. Mon.*, 487-8 ; *Constitution Ky.*, sec. 37, art. 2.

T. N. LINDSEY and G. W. CRADDOCK, for appellee, cited *Civil Code*, sec. 431 ; 2 *Rev. Stat.*, page 126, sec. 1, art. 3 ; *act of Feb.*, 1858 ; *act of 1861*, page 93.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

In September, 1839, the appellants recovered a judgment against the appellee, on which an execution soon afterwards issued, and was returned, "No property found."

In July, 1846, a second execution issued, which, in September following, was also returned, "No property found."

No further step appears to have been taken by the appellants to enforce satisfaction of their judgment until the 8th of October, 1861, when they sued out a third execution.

The appellee, on notice filed, moved the court to quash this execution on the grounds, as stated in the notice, (1.) that the judgment had been paid, and (2.) that it was barred by the statute of limitations. The court below rendered a judgment sustaining the motion, and quashing the execution, and of that judgment the appellants complain.

1. No attempt was made on the trial to prove by any direct evidence the alleged payment of the judgment. Nor do we think the facts and circumstances proved sufficient to authorize a presumption of payment. The appellee was insolvent in October, 1842, and also in September, 1846. This is conclusively shown by the two executions which were returned at those dates, as already stated. And he wholly failed to show that there had been subsequently such a change in his condition as would authorize the deduction that satisfaction of this

judgment either had been, or could have been, coerced by legal process. And certainly the mere lapse of time—a period of fifteen years and a few days—cannot be held to justify any such presumption.

2. But it is insisted that the right of the appellants to enforce their judgment, by execution or otherwise, is absolutely barred by the *first section*, of *article 3*, of the chapter of the Revised Statutes, entitled, "limitation of actions and suits," which declares that "an action or suit upon a judgment or decree of any court of the United States, or of any State or territory thereof, the period to be computed from the date of the last execution thereon," shall be commenced within fifteen years after the cause of action first accrued. (*Rev. Stat.*, vol. 2, page 126.)

On the part of the appellants it is contended that this section has no application to the case before us, because, in the first place, its prohibition is confined exclusively to an *action* or *suit* upon a judgment or decree, and does not embrace an *execution* or other similar process for the enforcement of such judgment or decree; and, because, in the second place, the statute embraces judgments and decrees rendered, not by the courts of this State, but by the courts of the United States, and of any of the other States or territories.

Without discussing or deciding these points, we proceed to the consideration of a question arising upon other statutes relating to the same general subject, and on which the decision of this case must depend.

Pre-existing causes of action were, by the Revised Statutes, expressly exempted from the operation of the laws of limitation therein prescribed, the *first section* of the first article declaring that the provisions of the chapter should not apply to actions already commenced, nor to cases in which the right of action had accrued. Thus stood the law from the adoption of the Revised Statutes until the passage of the act of 1858, by which it is declared, "that the provisions of chapter sixty-three of the Revised Statutes shall extend to and embrace all cases in which the right of action accrued, whether before or

after the Revised Statutes took effect, from and after the first day of August, 1859." (2 vol. *Rev. Stat.*, page 135.)

The title of the act is, "An act to amend the *second section* of article sixty-three, of the Revised Statutes, entitled, 'limitations of actions and suits.'"

And the question now to be decided is, whether the act is not in conflict with the 37th section of the 2nd article of the Constitution, which provides that, "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

This question was alluded to, but not decided, in the recent case of *Hedger, &c. vs. Rennaker*, (3 *Met. Ky. Rep.*, 257.) It is there strongly intimated that the title does not express, with any degree of certainty or accuracy, the *subject* of the enactment. "The title refers exclusively to the *second section* of the chapter on limitations. The subject (and only subject,) of that section, is the limitation of actions for the recovery of real property. But the act which, according to its title, purports to amend but a single section of the chapter, is very much broader, and comprehends and operates upon almost every section of the entire chapter." The title is, therefore, misleading and delusive, affording no indication whatever of some of the subjects to which the act relates. It may be well supposed that whilst an amendment of the second section merely, as the title proposed, might have been unobjectionable to the members composing the legislative body, by whom the act in question was passed, an amendment which gave a retroactive effect to the limitation of every description of suit or action, might have been deemed highly inexpedient.

It seems to us, therefore, that the case is clearly within the letter and policy of the constitutional inhibition, and that the act under consideration, or at least so much of it as applies to any other subject than that expressed in the title, is inoperative and void. This indeed seems to have been the view of the Legislature itself, as indicated by the passage of the act of March, 1862, containing substantially the same provisions as the act we have been considering.

It results that at the time this proceeding was commenced

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there was no statute of limitation in force, applicable to the judgment on which the execution in favor of the appellants was issued, and that their execution was improperly quashed.

The judgment is therefore reversed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

CASE 5—PETITION ORDINARY—DECEMBER 10.

Green vs. Carson, &c.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

1. In an action by husband and wife, and their assignee, upon two notes, one of which was executed to her, and the other to her and her husband jointly, and both reciting that they were given to secure the rent of a tract of land which had been assigned to her for dower in the estate of her former husband, who died in 1851, *held*, that the defendant cannot set up demands against the husband as a set off against the debts sued on.

2. The case of *Smith, &c. vs. Long, &c.*, (1 *Met. Ky. Rep.*, 486,) merely decides that where a husband and wife had jointly executed a bond for the conveyance of land belonging to the wife, and had put the vendee in possession, she was not entitled in equity to recover of the vendee rent for the time he had occupied the land under the purchase.

C. BENNETT, for appellant; cited 1 *Littell*, 167; 15 *B. Mon.*, 604; 1 *Met.*, 488.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

Carson and wife brought this action jointly with their assignee Elliott, against the defendant Green, on two notes executed by the latter, one of which was made payable to Mrs. Carson and the other to her and her husband jointly, and both of which had been assigned by them to Elliott.

It is recited in both the notes that they were given to secure the rent of a tract of land which had been assigned to

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Mrs. Carson as dower in the estate of her former husband, who died in the year 1851.

The defendant in his answer set up various demands against the husband, which he prayed might be allowed as a set-off against the debts sued for. The court below sustained a demurrer to this answer, and rendered a final judgment against the defendant, and he has appealed.

We think the decision was right.

To have allowed the set-off by sustaining the defense relied on, would have been in effect to subject the rent of the wife's land to the payment of the separate debts of the husband, which cannot now be done.

By the *first section of article 2 of the Revised Statutes* (2 vol., p. 8,) after defining the rights and powers of the husband with respect to the real estate and slaves of the wife, it is provided that such real estate, nor the rent nor hire thereof, shall be liable for any debt or responsibility of his contracted or incurred before or after marriage. "Nor shall the husband's contingent right of courtesy, or life estate, or his right to such use, rent, or hire, be sold for, or otherwise subjected to the payment of any separate debt or responsibility of his during her life."

Nothing need be said to show that this statute embraces the case before us, and must necessarily operate to defeat any such effort to appropriate the rent of the wife's land to the payment of her husband's debts.

The case of *Smith, &c. vs. Long, &c.*, (1 Met. Ky. Rep., 486,) merely decides that where a husband and wife had jointly executed a bond for the conveyance of land belonging to the wife, and had put the vendee in possession, she was not entitled in equity to recover of the vendee, rent for the time he had occupied the land under the purchase.

The judgment is affirmed.

Bivins vs. Helsley.

CASE 6—PETITION ORDINARY—DECEMBER 10.

Bivins vs. Helsley.

APPEAL FROM THE TODD CIRCUIT COURT.

1. If one sign a note as surety, to be obligatory upon him upon the condition two others, who are named, should sign it as his co-sureties, and the note is left with his principal to procure the names of the other sureties to be signed to it, and these facts are known to the payee at the time the note is delivered to him, if the condition be not complied with the note will not be obligatory upon the surety. (2 Met., 542.)

2. See the opinion for a particular statement of the evidence, in support of the defense *supra*, held not sufficient to sustain it, or discharge the surety.

BRISTOW & PETREE, for appellant.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This action was brought by appellant on a note executed to him by John H. Bivins, as principal, and appellee, as his surety.

Appellee defended the action, and alleged in his answer that he signed the note upon the condition that M. H. Bivins and Thos. T. Bivins would also sign it, they being then solvent, and that the terms and conditions upon which he signed the note were known to appellant at the time he signed it, and at the time it was delivered to him, and, as the condition upon which he signed it was not complied with, he is not bound to pay it.

A demurrer was put in to that answer, which was overruled by the court below, which presents the first question for our consideration.

The proper, and perhaps the only interpretation to be given to the language employed in the answer, is, that appellee signed the note, to be obligatory upon him upon the condition that the two individuals named signed it as his co-sureties, and that the note was left with his principal to procure the names of the other sureties to be signed to it, and that these facts

were known to appellant at the time the note was delivered to him.

Admitting, (as the demurrer does,) that the statements in the answer are true, the note, at the time appellee signed it, was incomplete, and was to be obligatory upon him upon the condition that M. H. and Thos. T. Bivins signed it, of which condition appellant was apprised, and, if he accepted the note before the condition was performed, he took it subject to the right of appellee to avail himself of the non-performance of the condition.

The answer, therefore, presented a valid defense to the action, and the demurrer was properly overruled. (*Coffman, &c. vs. Wilson, &c.*, 2 Met., 542.) But are the allegations of the answer sustained by the proof? We think they are not.

Giving to the evidence all the advantages of a most liberal interpretation, it amounts to this : that appellant and John H. Bivins, the principal, went to appellee when he was applied to by his principal, out at the yard fence, to execute the note as his surety, which he consented to do, provided he would get the two Bivins, to sign the note also ; this he promised to do, and this agreement between them may have been, and most probably was, heard by appellant. All three of them then went into the house, where the note was written, signed by the principal and appellee, and then delivered to appellant, without a word having been said to him that any other person was to sign it before it was to be obligatory on the surety, or that it was to be signed by any other persons at all ; indeed it does not appear that anything was said in the house about the note except that directions were given to Frazier to write it.

Appellant had no conversation with appellee in relation to the note during the negotiation. J. H. Bivens promised to give him a note with appellee as his surety for his horse ; he was willing to take such a note ; they went there for the purpose of having the note executed, and, after the conversation at the yard fence between the principal and appellee, which appellant may or may not have heard, they all went into the house, and the note was executed and delivered to appellant.

Hayes vs. Goodwin.

If appellee did not intend to be bound until the other parties signed the note, it was his duty to object to the delivery of it to appellant until the condition was performed, or, upon its delivery, to have informed him distinctly that he would not be responsible until the other parties signed it. If this had been done, appellant, (as may be assumed,) would not have parted with the possession of his horse until the other two names were signed to the note; but, having failed to do it, appellant may well have concluded, even if he heard the conversation at the fence, that appellee had become willing to take the responsibility upon himself, and dispense with the previous agreement.

We are, therefore, of opinion that the conclusions to which the circuit judge came, (the law and facts having been submitted to him,) were unauthorized by the proof. Wherefore, the judgment is *reversed*, and the cause remanded for a new trial and for further proceedings consistent with this opinion.

CASE 7—PETITION ORDINARY—DECEMBER 11.

Hayes vs. Goodwin.

APPEAL FROM THE FAYETTE CIRCUIT COURT.

1. Where a borrower of money, at a usurious rate of interest, pays the principal and interest, which, on the same day, is re-loaned to him, in accordance with an agreement to that effect, the statute of limitation against the recovery of the usury so paid begins to run. But if the period of limitation is not complete when the lender sues the borrower upon the note given in renewal, the latter may use the usury so paid as a set-off, although at the time of filing his answer the period of limitation had elapsed. The limitation ceased at the commencement of the suit.

2. To authorize a set-off there must be mutual subsisting demands constituting causes of action at the commencement of the suit; and limitation ceases against a set-off at the commencement of the suit.

3. Directions as to computing interest upon usury paid.

Hayes vs. Goodwin.

HUNT & BECK, for appellant, cited 3 *Bibb*, 49 ; 3 *Chitty Pleading*, 1159 ; 69 *Eng. C. L. R.*, 1046.

ROBINSON & JOHNSON, for appellee, cited *Civil Code*, secs. 126, 128.

R. H. PREWITT, on same side, cited *Civil Code*, secs. 126, 401, 128 ; 3 *Met.*, 322-3.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Goodwin, having lent money to Hayes at an usurious rate of interest and the money being due, told Hayes that "if he wished to keep the money he must pay the debt ;" and Hayes accordingly handed to Goodwin the amount of the debt and interest, including the usury, and Goodwin, on the same day, handed the money (\$2,065.40.) back to Goodwin, and took his note therefor, dated January 31, 1857. In October, 1858, Hayes paid the interest on that note, at the rate of 10 per cent. per annum, and part of the principal, and gave a new note for the residue of \$1,932 ; and in March, 1860, he paid the interest at the like rate on the last named note, and part of the principal, and for the residue, amounting to \$1,900, gave a new note, dated March 3d, 1860, and payable one day after. Hayes paid a considerable amount of usurious interest to Goodwin prior to January, 1857. On the 18th January, 1862, Goodwin sued Hayes on the last named note. On the 25th of February, 1862, Hayes filed an answer stating the facts, and contending : 1. That the acts above mentioned as having been done in January, 1857, were done in evasion of the statute against usury, and were not a payment of the debt, and that he is entitled to a credit upon the note sued on for all the usury paid to Goodwin, amounting, as alleged, to at least \$850.00. 2. That if said acts amounted to a payment, he is entitled to recover the usury, alleged to be \$327.81, embraced in the \$2,065.40 handed to Goodwin and re-borrowed, and he pleaded it as a set-off. To the set off the plaintiff replied, relying on the statute of limitations, and on the settlement made in January, 1857. The circuit judge, to whom the law and facts were submitted, gave judgment against Hayes for \$1,632.

40, with interest from March 3, 1860, from which he appealed.

1. The first question is whether or not there was a payment of the debt and interest on the 31st January, 1857.

There was evidently an implied, if not expressed agreement, that Goodwin would re-lend and that Hayes would re-borrow the money. But, notwithstanding that agreement, and conceding that either party might have recovered damages for a breach of it by the other, yet Goodwin could have kept the money and have refused to re-lend it, or Hayes could have refused to re-borrow it; and it seems clear that, in either case Hayes could have recovered the usury, and equally clear, that his right of recovery must have arisen, not from the fact that he had refused to re-borrow the money, or that Goodwin had refused to re-lend it, but from the fact that the usury had been paid. It necessarily follows that, at the moment when Hayes handed the money to Goodwin, a right of action for the usury accrued to him, and that he did not lose that right of action by afterward borrowing the money in accordance with the previous agreement. We are of the opinion that if Hayes had brought such an action in 1857, Goodwin could not have defeated it by showing that he had received the money under an agreement to re-lend it, and that he had re-lent it accordingly.

It is contended, however, that the transaction was a device to evade the statute against usury, and should, therefore, be treated as a nullity. But we do not perceive upon what ground it can be so regarded. The rights of the parties with reference to the usury were the same after that transaction as before, conceding that it was a payment. Unless the statute of limitations interferes, Hayes' right to recover the usury paid is as perfect as was his right to refuse payment. Goodwin's object probably was to give Hayes a right of action for the usury, so that the limitation might commence. But we perceive no process of reasoning by which that effort to take advantage of the statute of limitations, can be construed into an attempt to evade the statute against usury, or can otherwise be pronounced unlawful.

2. The next question is, whether the limitation ceased at the commencement of the suit by Goodwin, or continued to run until the filing of Hayes' answer claiming the usury as a set-off.

With reference to this question, the provisions of the statute of 29 Geo. I, chap. 22, of the Kentucky statute of 1796, (2 S. L. 1448,) and of the Code of Practice, (secs. 125, 128, and 401,) are substantially the same. Under the two former statutes it was settled that, to authorize a set-off, there must be mutual subsisting demands, constituting causes of action, at the commencement of the suit. (*Babington on Set-off*, 68; *Hawthorn vs. Roberts*, *Hardin*, 70; *Williams vs. Gilchrist*, 3 *Bibb*, 49; *McConnell vs. Morrison*, 1 *Litt.*, 206.) And, under the English statute, it has been expressly decided that limitation ceases against a set-off at the commencement of the suit. (*Walker vs. Clements*, 69 *Eng. Com. L. R.*, 1046.) In that case the principle upon which that rule is founded was thus stated: "The set-off is substituted for a cross-action. When are we to suppose that cross-action brought? Clearly at the time of the commencement of the plaintiff's action, since a set off not then existing cannot be insisted upon." This reasoning furnishes an answer to the arguments of Goodwin's counsel, based upon the changes of the law in requiring suits to be commenced by petition instead of by writ, in authorizing answers to be filed in vacation, and in authorizing the defendant to proceed upon his set-off, though the plaintiff may have dismissed his action. Evidently, none of those provisions affect the principle upon which the rule under consideration was founded.

• Our opinion, therefore, is, that Hayes' claim for the usury paid on the 31st January, 1857, is not barred by limitation.

His allegation that said usury amounted to \$327.81 was not denied in the reply. Upon the pleadings and evidence the court below should have allowed him that sum as a set-off, with legal interest thereon from January 31, 1857, to March 3, 1860; and should also have allowed him \$140.68, (being interest at the rate of 4 per cent. per annum from January 31, 1857, to October 13, 1858,) with legal interest thereon from October 13, 1858, to March 3, 1860; and \$107.33, being inter-

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est at the rate of 4 per cent. per annum, from October 13, 1858, to March 3, 1860. These credits would have reduced the judgment below the sum for which it was given, and it must, therefore, be reversed. But, as Goodwin is entitled to a new trial, and may present new facts, we cannot, direct, as suggested by Hayes' counsel, that a judgment conforming to our opinion shall be entered on the return of the cause.

The judgment is reversed, and the cause remanded for a new trial and other proceedings, not inconsistent with this opinion.

CASE 8—PETITION EQUITY—DECEMBER 12.

Maraman's Administrator vs. Maraman.

APPEAL FROM BULLITT CIRCUIT COURT.

1. Antenuptial executory contracts between husband and wife, to be performed during marriage, have been frequently enforced in equity, although void at law.

2. Conveyances from husband to wife, without a trustee, have been frequently supported in equity, although at law, as a general rule, executed as well as executory contracts between them, without a trustee, are void.

3. At law the husband is entitled to a note given to his wife by a stranger. Yet, where the purchaser of land executed a note payable to the vendor's wife, in pursuance of an agreement between the husband and wife, and in consideration of her releasing dower, her right to the note was sustained in equity.

4. A husband is legally entitled to his wife's earnings, but his agreement to give them to her has been held valid in equity.

5. Executory contracts between husband and wife, without the intervention of a trustee, have been held to be valid in equity. As a general rule, wherever a contract would be good at law, when made with trustees for the wife, that contract will be sustained in equity when made by husband and wife with each other without the intervention of trustees, if it does not affect the rights of third persons.

6. If, in consideration of a married woman conveying her land and slaves for her husband's benefit, he agrees to pay the value of her interest to a trustee for her separate use, the contract will be valid at law. If there is no trustee, her equitable right to the money will not be defeated, because whenever a separate use is created for a married woman, whether by her husband or by a stranger, whether by an executed or executory contract, equity will if necessary make her husband her trustee.

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7. Nor is it necessary, in order to give her a right to the money for her separate use, that the notes of the husband to her should be so expressed. Though a stranger's conveyance of property or covenant to pay money to a married woman, or to a trustee for her, in order to give her a separate use, must contain words indicating such intention, such words are unnecessary in a husband's conveyance or covenant.

8. Section 2, article 2, of chapter 47 of the Revised Statutes, which provides that husband and wife may sell and convey her chattel real, or slave, in the same mode as the land of the wife may be sold and conveyed, and that "the proceeds shall be his, unless otherwise expressly provided in the conveyance or the obligation of the purchaser" does not apply, nor is there any similar provision applying, to a wife's real estate. But where the wife joins with the husband in selling her slaves in order to give him the proceeds, and for that consideration he gave her his note, such a provision is not necessary in order to give her an equitable claim on the husband for the value of the slaves in accordance with his agreement.

9. That the husband was dealt with and obtained credit upon the faith that the proceeds of land and slaves of the wife belonged to him, does not, so far as he and his representatives are concerned, constitute a defense against a recovery by her upon a note executed by him to her in consideration of her conveyance of the property for his benefit.

10. Nor does the fact that part of the proceeds of the property was used by the husband in paying store accounts contracted by her, and in purchasing a carriage for her and by her direction, constitute a defense against such recovery.

11. But, though a married woman is equitably entitled to have notes, which were executed by her husband to her in consideration of her conveyance of her land and slaves for his benefit, paid out of his estate, yet where her claim is a mere equity, and there is no legal demand to which she can be substituted, it cannot be enforced to the prejudice of her husband's creditors in a settlement of his insolvent estate.

12. Such a claim is not embraced by the statute which requires that in the settlement of the estates of insolvent decedents, all debts and liabilities shall be of equal dignity and be paid ratably. In such case it does not stand upon the footing of even a simple contract debt.

W. R. THOMPSON, for appellant, cited *B. Mon.*, 296; 14 *Ib.*, 260; *Rev. Stat.*, 388; 1 *Ch. Rep.*, 33; *Clancy on Husband and Wife*, 393; 11 *Vesey*, 526; 5 *J. J. Mar.*, 230; 12 *B. Mon.*, 329; 3 *Mon.*, 34; 4 *Dana*, 141; 9 *B. Mon.*, 544; 2 *Story's Eq.*, sec. 1367; 16 *B. Mon.*, 376.

WM. WILSON, for appellee, cited 1 *Blackstone*, note, page 442; 2 *Verm.*, 347, 659; 1 *Bro. P. C.*, 1; 1 *P. Wms.*, 264; 2 *Atk.*, 334; 1 *Fondranque Eq.*, 102-3; 2 *Story's Eq.*, page 1377; 8 *B. Mon.*, 320

JAMES HARLAN, on same side, cited 2 *Story's Equity*, secs. 1368, 1367, 1370, 1372, 1373; *Ib.* note 3, on page 608; *Roper*, chap. 4, pages 143-162; 16 *Vesey* 201; *Clancy on Rights of Married Women*, chap. 12, page 589; 2 *Kent* 342.

Maraman's Administrator vs. Maraman.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

This suit was brought by the appellee, the widow of Francis Maraman, against the appellant, his administrator, to recover the amount of four notes, one of which is as follows:

"Due Martha A. Maraman nine hundred and forty-six dollars for value received of her. July 22, 1855.

F. MARAMAN."

And another is as follows:

"Due Martha A. Maraman three hundred ninety-two dollars fifty cents, borrowed money. Feb. 2nd, 1855.

F. MARAMAN."

The other two notes are of the same character.

Mrs. Maraman alleges that she married said F. Maraman in 1852; that she owned by inheritance, a tract of land and an interest in several slaves; that her husband being hard run for money, and much embarrassed, induced her to unite with him in selling said land and slaves, upon an express promise, and with the understanding that he would make her full compensation for the same out of his own property, that he executed said notes to her for the land and slaves, and assured her that they would secure her in the amounts they called for, and that he would pay them in money or property as soon as he got in little better circumstances; and that he died leaving her with a small child and without any means of subsistence.

The administrator, in his answer, does not deny any of these allegations in the manner required by the Code to put the facts in issue. He admits that the decedent, about a month before his death, "informed the defendant that he owed his wife about \$1,700, and that he wanted it paid." He resists recovery upon the ground—1st, that the notes are void because of the marital relation between the parties; 2d, that neither the conveyances of the land and slaves nor the obligations of the purchasers contained any provision that the proceeds should not be Maraman's; 3d, that Maraman obtained credit and was dealt with upon the faith that said proceeds belonged to him; and 4th, that most of said proceeds were used in paying store accounts contracted by Mrs. Maraman, and in purchasing a carriage for her and by her direction. He also says that the

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decedent's estate is insufficient, as he believes, to pay his debts, and that he has filed a petition to settle it and for a *pro rata* distribution among the creditors; and prays that the two suits may be consolidated. No order of consolidation was made.

We need not state the character of the proof, because, in our opinion, it cannot change the *status* of the parties as fixed by the pleadings.

The circuit judge gave Mrs. Maraman a judgment against the administrator for the amount of said notes and interest, "to be allowed in the action of the administrator for a settlement of the estate, and to be reported by the commissioners;" from which this appeal was taken.

1. That Maraman's notes are void at law is conceded. The question is whether they are also void in equity.

We are not prepared to admit, as contended by appellant's counsel, that all contracts between husband and wife are void in equity as well as at law unless they relate to separate estate of the wife.

At law, ante-nuptial executory contracts between husband and wife, to be performed during marriage, are extinguished by the marriage, and rendered as null as if they had been void from the beginning. Yet such contracts have been frequently enforced in equity. (*Cannel vs. Buckle*, 2 P. Will., 243; *Feryer vs. Penton*, 1 Vern., 408; *Acton vs. Pierce*, 2 Vern., 480; *Milburn vs. Ewart*, 5 T. R., 384; *Strong vs. Skinner*, 4 Barb. S. C. R., 546; *Vanallen vs. Humphreys*, 15 Id., 555; *Dabney vs. Kennedy*, 7 Grattan, 317; *Law vs. Smith*, 2 R. 1., 244.)

At law, as a general rule, executed as well as executory contracts between husband and wife, without a trustee, are void. Yet conveyances from husband to wife, without a trustee, have been frequently supported in equity. (*Bright on Husband and Wife*, vol. 1, page 32, 33; *Wells vs. Treadwell*, 28 Miss. R., 717; *Simmons vs. McElvain*, 26 Barb. S. C. R., 420; *Denning vs. Williams*, 26 Conn., 236; *Lile vs. Lile's Ex'r.*, 1 Dev. Eq., 185; *Huntly vs. Huntly*, 8 Ired. Eq., 250; *Ward vs. Crotty*, p. 50, 4 Met., decided by this court at its last term.)

At law the husband is entitled to a note given to his wife

by a stranger. Yet where the purchaser of land executed a note payable to the vendor's wife, in pursuance of an agreement between the husband and wife, and in consideration of her releasing dower, her right to the note was sustained in equity. (*Garlick vs. Strong*, 3 Paige, 440.)

A husband is legally entitled to his wife's earnings, but his agreement to give them to her has been held valid in equity. (*Slanning vs. Style*, 3 P. Will., 337; *Mangey vs. Hungerford*, 2 Eq. Ca. Abr., 156; *Wood vs. Warden*, 20 Ohio, 518.) The authority of *Slanning vs. Style* and *Mangey vs. Hungerford* has been, perhaps justly, questioned by Mr. Jacob, (2 Roper's H. & W. 104, n;) not, however, upon the ground that such an agreement would not be binding in equity, but upon the ground that in those cases there was not sufficient evidence of the agreement. In *Wood vs. Warden* the husband had received \$100 earned by his wife, and given her his note therefor, and his estate was held liable for it in equity.

Executory contracts between husband and wife, without the intervention of a trustee, have been held to be valid in equity in several other cases.

In *Guth vs. Guth*, (3 Bro. C. C., 614,) a husband's agreement, by deed-poll, for the separate maintenance of his wife, was enforced. That doctrine has been questioned, upon the ground that there was no consideration for the husband's agreement; and for other reasons which indicate an implied admission of the general power of husband and wife, to make contracts which may be enforced in equity, (2 Bright on H. & W., 330, and cases cited.) In *Livingston vs. Livingston*, (2 John. C. R., 537,) a parol agreement between husband and wife, that he should purchase and improve a lot for her and be repaid by the sale of another lot belonging to her, having been partially executed by him, was, at his suit, specifically enforced against her heirs. And in *Huber vs. Huber's adm'r.*, (10 Ohio, 371,) the court decreed payment of a note given by a husband to his wife for money derived from the estate of her former husband, and to which, when received, her second husband was legally entitled.

We perceive no ground for the distinction contended for by

appellant's counsel, as existing between contracts of husband and wife, with reference to her separate estate and other contracts between them. At law their contracts as to her separate estate are void; and we perceive no reason for supporting such contracts in equity, which does not equally apply to any contract which is based upon a sufficient consideration. In *Barron vs. Barron*, (24 Vermont, 398,) it was said that, "as a general rule, wherever a contract would be good at law, when made with trustees for the wife, that contract will be sustained in equity when made (by husband and wife,) with each other, without the intervention of trustees." That rule, if so limited as not to affect the rights of third persons, seems to be fully sustained by the authorities. Maraman had no power to dispose of either the land or slaves of his wife. Her conveyance was necessary to pass the title. We need not cite authority to prove that if, in consideration of her conveying the property for his benefit, he had agreed to pay the value of her interest to a trustee for her separate use, the contract would have been valid at law.

The fact that there was no trustee intervening between Mrs. Maraman and her husband, cannot defeat her equitable right to the money; because, whenever a separate use is created for a married woman, whether by her husband or by a stranger, whether by an executed or executory contract, equity will, if necessary, make her husband her trustee. (2 *Bright on H. & W.*, 214, and *sequel.*)

Nor was it necessary, in order to give her a right to the money for her separate use, that the notes should be so expressed. Though a stranger's conveyance of property, or covenant to pay money to a married woman, or to a trustee for her, in order to give her a separate use, must contain words indicating such intention, it seems to be well settled that such words are unnecessary in a husband's conveyance or covenant. (*Denning vs. Williams*, 26 Conn., 226; *Huber vs. Huber*, 10 Ohio, 371; *Wood vs. Warden*, 20 Ohio, 518; *Gaines adm'x. vs. Poor*, 3 Met., 503; *Ward vs. Crotty*, p. 59, 4 Met.) Maraman must be regarded as having agreed to pay the money to his wife for her

separate use; otherwise his notes, which he must have designed to have some effect, can have none in law or equity.

2. The Revised Statutes (*chap. 47, art. 2, sec. 2.*) contain this provision: "Husband and wife may sell and convey her chattel real or slave, in the same mode as the land of the wife may be sold and conveyed; and the proceeds shall be his, unless otherwise expressly provided in the conveyance or the obligation of the purchaser." This provision does not apply, nor is there any similar provision applying to a wife's real estate. Its precise object and effect need not now be decided. Mrs. Maraman is not claiming the proceeds of her slaves. She is suing upon her husband's contract to pay her a certain sum of money. She joined him in selling the slaves in order to give him the proceeds, and for that consideration he gave her his note. A provision in the conveyance, that the proceeds should be hers, would have been inconsistent with their object, and was not necessary in order to give her an equitable claim on him for the value of the slaves, in accordance with his agreement, though, in the absence of any agreement, the statute might have protected him against any claim by her.

3. The fact that Maraman was dealt with and obtained credit upon the faith that the proceeds of the land and slaves belonged to him, does not, in our opinion, constitute a defense, so far, at least, as he and his representatives are concerned. If it did, any person suing for money lent to another might, upon the same ground, be turned out of court.

4. Nor does the fact that part of the proceeds of the property was used in paying store accounts, contracted by Mrs. Maraman, and in purchasing a carriage for her, and by her direction, constitute a defense. In the absence of evidence to the contrary, it must be assumed that the debts thus contracted were his debts, not hers, and that he was bound for them in the same way as for any other debt contracted by him. Whether he paid them with the money obtained by selling her property, or other money, is not material.

But, though Mrs. Maraman is equitably entitled to have the notes of her husband paid out of his estate, shall this merely

equitable right be enforced at her instance to the prejudice of his creditors? The authority chiefly relied on by her counsel is this passage in *Story's Eq. Jur.*, sec. 1373: "If a wife unite with her husband to pledge her estate, or otherwise to raise a sum of money out of it, to pay his debts or to answer his necessities, whatever might be the mode adopted to carry that purpose into effect, the transaction would, in equity, be treated according to the true intent of the parties. She would be deemed a creditor, or a surety for him, for the sum so paid, and she would be entitled to reimbursement out of his estate and to the like privileges as other creditors." One of the cases cited by Judge Story in support of that doctrine is *Tate vs. Austen*, 1 P. Will., 264, in which a wife had joined her husband in a mortgage of her real estate to secure his debt, which he, by the deed, covenanted to pay to the mortgagee; he died leaving a will, giving several legacies, and owing debts by simple contract, and it was held that his personal estate must be applied: 1. To the creditors by simple contract. 2. To the mortgage. 3. To the legacies. That case certainly does not maintain that the wife is entitled to the like privileges as other creditors, in a contest between her and them. *Neimcewitz vs. Gahn*, (3 Paige, 614,) and the other cases cited by Judge Story, do not, we believe, go farther than this: that if a wife, out of her separate estate, pays her husband's debt, which is secured by a mortgage on his property, she is entitled as against other creditors to stand in the place of the mortgagee. The ground upon which those cases rest was thus stated by Chancellor Walworth: "No reason is given (*in Tate vs. Austen.*) for postponing the claim of the wife until after all other debts were paid. * * Lord Cowper probably considered the claim of the wife as a mere equitable claim against the estate of her husband, for which no suit at law could be brought against his representatives, without adverting to the fact that the covenant of the husband to pay the mortgage money was still an available security in the hands of the mortgagee, which would enable the latter to claim payment out of the real and personal assets of the husband, to the exclusion of the simple contract creditors, and that the wife, standing in the

situation of a surety, was entitled to be substituted to the place of the mortgagee." (3 *Paige*, 646.) Where, as in the case before us, the wife's claim is a mere equity, and there is no legal demand to which she can be substituted, it would seem to follow that her claim cannot be enforced to the prejudice of her husband's creditors. In *Clinton vs. Hooper*, (3 *Bro. C. R.*, 201,) which is referred to by Mrs. Maraman's counsel as being in point, the point decided was, that the wife, by certain declarations to her husband's executor, had waived her right to an exoneration of her estate out of the husband's property; but Lord Thurlow, in his opinion, apparently sanctioned the decision in *Tate vs. Austen*, (3 *Brown's C. C.*, 200; 1 *Ves. Jr.*, 173,) and we have seen no decision questioning the doctrine of that case except so far as it may be regarded as denying the wife's right to be substituted to the legal rights of the creditor whose demand she pays.

There is no allegation nor proof of a fraudulent combination between Mrs. Maraman and her husband, to give him a fictitious credit; but her petition shows that she placed the proceeds of her property in his hands to relieve him from pecuniary embarrassment, and expecting to be paid by him when his circumstances should become better. The natural tendency of her conduct was to give him credit with others, who knew nothing of the agreement between him and her. As she has come into equity for relief, sound policy seems to forbid that her claim, which has no legal validity, shall be placed upon an equal footing with the legal demands of creditors. A different doctrine might open the door to many frauds. In our opinion this claim is not embraced by the statute which requires that, in the settlement of the estates of insolvent decedents, all debts and liabilities shall be of equal dignity and be paid ratably. The object of that statute was to deprive executors and administrators of the power, which they formerly possessed, to pay some debts in preference to others of the same class, and to destroy the preference given by the common law to specialty over simple contract debts, and not to place upon an equal footing with such debts merely equitable

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claims, which, before the statute, were not regarded as standing upon the footing of even simple contract debts.

The judgment is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

CASE 9—PETITION ORDINARY—DECEMBER 13.

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Meador vs. Turpin.

APPEAL FROM THE BROOKINRIDGE CIRCUIT COURT.

1. Objection founded on technical rules of practice waived where the conduct of the party entitled to insist on it has been such as to induce his adversary to believe, and to act upon the belief, that the objection had been abandoned.

2. After the issue formed by the petition and answer has been submitted to the jury, who, upon the evidence introduced by both parties, rendered a verdict for the plaintiff, it is too late for the defendant to move to dismiss the petition upon the ground that it had not been verified.

3. Where instructions found in the record are not embraced in any bill of exceptions, nor otherwise shown what instructions, if any, were given or refused by the circuit court, such instructions complained of constitute no part of the record, and cannot be noticed by the court of appeals.

ALLEN & BRUNER, for appellant, cited *Civil Code*, secs. 164, 165.

JESSE W. KINCHELOE, for appellee, cited 15 *B. Mon.*, 630; *Civil Code*, secs. 414, 369, 368, 165.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

The issue formed by the petition and answer was submitted to a jury who, upon the evidence introduced by both parties, rendered a verdict in favor of the plaintiff for \$175. "Whereupon the defendant moved the court to dismiss the plaintiff's petition upon the ground that the same is not verified. The plaintiff moved the court to grant him leave to verify his petition, to which the defendant objected, said objection is over-

ruled by the court and said leave is granted the plaintiff, to which the defendant excepts;" and the motion to dismiss the petition having been overruled, judgment was entered in conformity to the verdict, from which the defendant has appealed.

To sustain his objection to the judgment, the appellant relies on *sections 164 and 165 of the Civil Code*, by which it is provided, in substance, that where petitions are filed without verification, as required by section 142, the action shall not on that account be dismissed, if the verification be made on or before the calling of the action for trial; and that "no objection shall be taken, after judgment, to any pleading for the want of or defect in the verification."

But neither the language nor object of these provisions authorizes the assumption contended for, that such an objection will, in all cases, and under all circumstances, be available before judgment with the effect of dismissing the action. Like numerous other similar objections founded on technical rules of practice, it may be waived by the party entitled to insist on it, either expressly or by implication. Such implication always arises where the conduct of the party has been such as to induce his adversary to believe, and to act upon the belief, that the objection had been abandoned. Accordingly it has been held that in an action against an executor, where the defendant appeared and answered to the merits, having made no objection for the want of the affidavit and demand required by law in such cases, it was too late, after the plaintiff had gone through with his testimony, to raise the objection for the first time, although the statutes declare that "no suit shall be brought against a personal representative until *after* a demand is made of him, accompanied with the affidavit required," and that *no recovery* shall be had of any such debt *until* such affidavit be filed in court. (*Thomas' ex'r. vs. Thomas*, 15 B. Mon., 178.)

The present is a stronger case for the application of the rule. The action was brought in December, 1860. The appellant filed his answer in March, 1861, and in April following the cause was continued at his instance. In April, 1862, there

Hanly & Co. vs. Downing et al.

was a trial and verdict against him, and then for the first time he makes the objection that the petition had not been verified. It was properly overruled.

Another ground of reversal relied on is, that the court erred in giving and refusing instructions. The instructions found in the record are not embraced in any bill of exceptions, nor is it otherwise shown what instructions, if any, were given or refused by the court. The instructions complained of, therefore, constitute no part of the record, and cannot be noticed by this court.

The judgment is affirmed.

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CASE 10—PETITION EQUITY—DECEMBER 18.

Hanly & Co. vs. Downing, et al.

APPEAL FROM THE PAYETTE CIRCUIT COURT.

1. In 1857 a married woman, being the owner of land, not her separate estate, joined her husband in selling it, and made provision in the conveyance that the proceeds should be invested in other property for her separate use. A part of the proceeds were invested in slaves, which were conveyed to a trustee for her separate use. *Held*, That the slaves cannot be subjected to the payment of an account against her for goods sold to her upon the faith and credit of her separate estate.

2. A separate estate, whether created before or since the statute, (*Rev. Stat.*, chap. 47, art 4, sec. 17,) cannot be charged in equity for any debt contracted by a married woman. (18 *B. Mon.*, 301; 3 *Met.*, 244.)

3. Where it was agreed by an antenuptial contract between husband and wife, that she might hold her estate for her separate use, the statute *supra* was held not to apply. (*Stites vs. Bryan*, *Ms. opin.*, 1858.) So where the property is secured to the wife's separate use by post-nuptial settlement. *Argu.*

4 The statute *supra* prohibits the sale by a married woman of her separate estate, purchased with the proceeds of her inheritance, although the conveyance to her gave her power to dispose of it as if she were an unmarried woman. (17 *B. Mon.*, 55.)

HUNT & BECK, for appellants, cited *Stites vs. Bryan*, *Ms. opin.*, 1858, cited in note to 2 *Rev. Stat.*, (*Stanton's*) 32; 2 *Ro-*

Hanly & Co. vs. Downing et al.

per Husband and Wife, 240; *Bro. Ch. C.*, 16; 16 *B. Mon.*, 376; 13 *B. Mon.*, 381; 15 *Ib.*, 327; *Rev. Stat.*, chap. 24, secs. 20, 21, 22; *Clancy on Rights*, 282; *Rev. Stat.*, chap. 47, art. 4, sec. 17.

G. B. KINKEAD, for appellees, cited *Rev. Stat.*, chap. 47, art. 4, sec. 17; 18 *B. Mon.*, 306; *Ib.*, 386; 17 *Ib.*, 59; 16 *Ib.*, 487; *Rev. Stat.*, chap. 47, art. 2, sec. 2.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

In 1857, Mrs. Downing, a married woman, being the owner of land not her separate estate, joined her husband in selling it, and made provision in the conveyance that the proceeds should be invested in other property for her separate use. A part of the proceeds were accordingly invested in slaves, which were conveyed to a trustee for her separate use. Hanly & Co., afterward sold goods to her, as they allege, and as, in our opinion, the evidence shows, upon the faith and credit of her separate estate; and brought this suit to subject said slaves to the payment of the account thus created.

They are entitled to relief, unless it is prohibited by the statute which declares, that, "if real or personal estate be hereafter conveyed or devised for the separate use of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may thereafter have, she shall not alienate such estate, with or without the consent of any husband she may have; but may do so when it is a gift, with the consent of the donor or his personal representative." (*R. S.*, chap. 47, art. 4, sec. 17.) The same section declares, that "such estates, heretofore created, shall not be sold or encumbered but by order of a court of equity." In the case of *Daniel, &c. vs. Robinson*, (18 *B. Mon.*, 301,) it was held that a separate estate, created before the statute, cannot be charged in equity for any debt contracted by a married woman. And in the case of *Stacker vs. Whitlock*, (3 *Met.*, 244,) it was decided that the same rule applies to separate estates created since the statute.

But where it was agreed, by an ante-nuptial contract between husband and wife, that she might hold her estate for her separate use, the statute was held not to apply. (*Stites vs.*

Mountjoy's Adm'r. vs. Pearce et al.

Bryan, Mss. opin., 1858, cited in 2 St. R. S., 32.) And it is contended, upon the authority of that case, that the statute is inapplicable here, because the slaves were purchased by the wife with the proceeds of her land. We concede that, as contended by counsel, it can make no difference whether the property is secured to the wife's separate use by ante-nuptial or post-nuptial settlement. The material difference between this case and that of *Stitcs vs. Bryan* consists in the form of the settlement. That case was not within the terms of the statute, because the estate had not been conveyed or devised for the separate use of the wife; her separate right was secured by her husband's covenant; and a strained construction would have been required to bring the case within the statute. But here a strained construction would be required to take the case out of the statute. In the case of *Stuart vs. Wilder* (17, B. Mon., 55,) it was held that the statute prohibited the sale by a married woman of her separate estate, purchased with the proceeds of her inheritance, although the conveyance to her gave her power to dispose of it as if she were an unmarried woman.

The judgment dismissing the petition is affirmed.

CASE 11—PETITION EQUITY—DECEMBER 13.

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Mountjoy's Adm'r. &c. vs. Pearce et al.

APPEAL FROM HICKMAN EQUITY AND CRIMINAL COURT.

1. It is error to render judgment, even by default, in favor of heirs and distributees against the administrator of an intestate for the amount in his hands, subject to distribution, without requiring a refunding bond from the distributees. (4 Bibb, 266; 7 Mon., 643; 3 J. J. Mar., 684; Civil Code, sec. 471.)

2. Section 471 of the Civil Code is substantially a re-enactment of the statute of 1797, section 50, as construed by the court of appeals in the above cited cases.

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3. In a suit by heirs and distributees of an intestate against the administrator and his sureties in the administration bond, brought to recover the amount in the hands of the administrator subject to distribution, the petition must set out the terms or substance of the bond alleged to have been executed by them—otherwise it will not show a cause of action against the sureties. (14 B. Mon., 86; *Ib.*, 255.)

. WORTHINGTON & JOHNSTON, for appellants, cited *Civil Code*, sec. 471; 14 B. Mon., 83; *Ib.*, 222; 1 Met., 430; *Civil Code*, sec. 123 and notes; 15 B. Mon., 443; 5 J. J. Mar., 665; 1 Litt., 100; 11 B. Mon., 31; *Chitty on Contracts*, 31; 4 Bibb, 266; 1 Litt., 294; 5 Mon., 525; 7 Mon., 643; 3 J. J. Mar., 687; 4 *Ib.*, 446; 1 Stat. Law, 668; *Rev. Stat.*, 336; 6 Dana, 313; *Wassen vs. Wilson*, *Ms. opin.*, January, 1859; 1 J. J. Mar., 330; 11 B. Mon., 94; 12 *Ib.*, 321; 2 Bibb, 292; 4 Bibb, 241.

SIMPSON & SCOTT, on same side, cited 13 B. Mon., 466; *Goddard vs. Maddock*, *Ms. opin.*, Dec., 1854; *Civil Code*, sec. 118, sub-div., 3; 14 B. Mon., 85, 86; *Ib.*, 254, 255; 7 Mon., 643; 3 J. J. Mar., 687; 4 *Ib.*, 446, 152; 3 Dana, 181.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Pearce and others, heirs and distributees of Elizabeth Mountjoy, obtained a judgment against Joseph Kennedy, her administrator, and against Lillard and Bugg, his sureties in the administration bond, for \$1,473.22, alleged to be in the hands of the administrator and subject to distribution, from which this appeal was taken.

No answer was filed by either of the defendants, and the judgment was rendered by default.

It was erroneous to render judgment against the administrator without requiring a refunding bond from the distributees. This was well settled under the 50th section of the act of 1797, (1 S. L., 668,) which declared that, "no distribution shall be made of the intestate's estate until nine months after his death; nor shall an administrator be compelled to make distribution at any time until bond and security be given by the person entitled to distribution, to refund due proportions of any debts or demands which may afterwards appear against the intestate." (*Prewitt's ex'r. vs. Prewitt's heirs*, 4 Bibb, 266; *White &c. vs. Clarke*, 7 Mon., 643; *Shirley vs. Mitchell*, 3 J. J.

Knott's Adm'r. vs. Hogan.

Mar., 684. We need not consider the effect of *section 11, art. 2, chap. 37, of the Revised Statutes*, which declares that, "Before an administrator shall make distribution, each distributee shall, if required, give an obligation, with good surety, to refund," &c.; because it is provided in the Code that, in proceedings of this character, "the court shall require the distributee or legatee, before receiving his distributive share or legacy, to execute bond, with good surety, to the commonwealth, conditioned to pay his proportion, not exceeding the amount received by him, of any debt which may appear against the estate," &c., (*section 471.*) This was substantially a re-enactment of the statute of 1797, *section 50*, as construed in the above cited cases.

The judgment against the sureties was erroneous for another reason. The petition showed a cause of action against the administrator irrespective of the bond, but it stated no cause of action against the sureties, because it did not state the terms or substance of the bond alleged to have been executed by them. (*Hill vs. Barret*, 14 B. Mon., 86; *Collins vs. Blackburn, Id.*, 254.)

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CASE 12—PETITION EQUITY—DECEMBER 18.

Knott's Adm'r. vs. Hogan.

APPEAL FROM THE NELSON CIRCUIT COURT.

1. Where two writings are executed at the same time, with reference to each other and to the same subject matter, they constitute but one agreement, and are to be construed as if written on the same piece of paper.

2. Gifts *causa mortis*, are in general conditional, like legacies, but it is absolutely essential to them that they be made by the donor in his last illness, or in contemplation or expectation of death.

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3. To make a valid gift, simply so called, or a gift *inter vivos*, it is essential that it should be *irrevocable* by the donor. (5 *Litt.*, 12; 5 *Mon.*, 170; 4 *B. Mon.*, 538.)

4. At the time a note for money loaned was executed, payable three years after date, the interest thereon to be paid annually, the payee executed and delivered to the payor, a writing stipulating that, if the payee should not collect the note in her lifetime, her representatives were directed to surrender it to the payor, "*as I intend it as a gift from me to him.*" The payee retained the note in her possession during her life, and died within less than a year after the execution of the writings. *Held*, That this is not a valid executed gift which a court of equity should enforce.

5. The writing *supra*, might, if established according to the requirements of the statute of wills, take effect as a testamentary disposition.

W. R. GRIGSBY, for appellant.

J. E. NEWMAN, for appellee, cited 2 *Bibb*, 611; 3 *J. J. Mar.*, 354; *Story on Contracts*, sec. 993; 2 *Sanford's Ch. R.*, 400.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

Hogan executed to Sally Knott his note for six hundred dollars, dated the 21st December, 1859, payable three years after date, the interest thereon to be paid annually. She, at the same time, executed and delivered to Hogan the following writing:

"I have this day loaned to James H. Hogan six hundred (dollars.) for which he has executed his note at three years after date, interest to be paid annually if I require it. If I should not collect the said note during my lifetime, in that event my executor or administrator is hereby directed to surrender the said note to the said James H. Hogan, as I intend it as a gift from me to him. Witness my hand, Dec. 21, 1859.

SARAH KNOTT.

Witness: E. B. SMITH."

Within less than a year after the execution of these writings Sally Knott died, and in March, 1862, her administrator brought this action against Hogan, alleging that shortly after the death of his intestate the defendant produced the paper referred to, and demanded the surrender of the note, with which demand the plaintiff complied, under the mistaken belief that the defendant was entitled thereto. He claims that the defendant is bound upon said note, and should be compelled to restore the possession, and to pay the two instalments of interest which had accrued thereon.

The defendant in his answer did not controvert the material facts, but resisted the right of the plaintiff to any relief, on the ground that, as the intestate had failed to collect or to require payment of the note in her lifetime, he was, by the express terms of the writing executed by her, discharged from liability on the note, and that it was properly surrendered to him.

No evidence was taken by either party, and the court below, on the pleadings and exhibits, rendered a judgment dismissing the action. From that judgment the plaintiff has appealed.

In support of the judgment it is insisted, by the appellee, that, as the two writings were executed at the same time, with reference to each other and to the same subject matter, they constitute but one agreement, and are to be construed as if written on the same piece of paper.

This is no doubt true. And the question then arises, what is the legal effect of the agreement, as evidenced by the two instruments? Can it be regarded as a valid executed *gift* of the six hundred dollars to the appellee, which a court of equity should enforce?

It is clear that the agreement is not within that class of gifts usually denominated gifts *causa mortis*. Such gifts, it is true, are, in general, conditional like legacies, but it is absolutely essential to them that they be made by the donor in his last illness, or in contemplation and expectation of death. If maintainable at all, therefore, it must be as a gift, simply so called, or a gift *inter vivos*.

In relation to the various requisites of a valid gift, a vast amount of abstruse learning is to be found in the decisions of the courts, English and American, upon this subject. And conflicting as those decisions are upon most other points, it seems to be agreed, on all hands, that it is essential to every gift of this class, that it should be *irrevocable* by the donor.

This rule has been repeatedly recognized and acted on by this court. In the case of *Duncan's adm'r. vs. Duncan*, (5 Litt. 12,) the intestate had deposited certain bonds in the hands of one Hanks, telling him to keep them until he called for them; that his wife and her children were wasting his estate. and he

Knott's Adm'r. vs. Hogan.

was afraid to keep the bonds in his house, and if he did not call for them, they were to be given, after his death, to his children by his first wife. The intestate was not then sick, but died in about six months, leaving a considerable estate; the plaintiff had administered on his estate, and Hanks, shortly after his death, delivered the bonds to the donees. It was held that the court below was mistaken in supposing that the transaction amounted to a valid gift *inter vivos*; that "to the validity of such a gift it is essential that there should be a delivery to the donee, and that the property of the thing given should immediately pass, and be irrevocable by the donor;" that there was no effectual delivery of the bonds, and the property thereof could not pass by the delivery to Hanks, who was a mere depository, and was bound to restore them when called on by the intestate, in whom, by the very terms of the deposit, the property remained during his life, and the whole transaction was, therefore, revocable at his pleasure, and as a gift *inter vivos* it could not take effect. And that, as it was undoubtedly the intention of the intestate that the property of the bonds in question should, at his death, be vested in the defendants, and as such intention was not revoked in his lifetime, the transaction might have taken effect as a nuncupative will, if the requirements of the statute respecting such wills had been complied with.

The same principle was recognized in the subsequent cases of *Walden's adm'r. vs. Dixon*, (5 Mon., 170,) and *Brown vs. Brown's adm'r.*, (4 B. Mon., 538.)

The analogy between these cases and the one before us is complete. Although there is some difference in the facts, the difference is not such as to justify the application of a different principle. Here the intestate *loaned* the money in question to the appellee; she retained in her own possession, during her life, his note for the sum loaned; and she reserved, moreover, by the express terms of the contract, the absolute right, during her life, to coerce payment of the debt and interest at the maturity of the note. As already shown, she died within less than a year after the execution of the writings and before any right had accrued to her to collect either the principal of the

sum loaned, or the first annual instalment of interest thereon. There had been, therefore, no opportunity allowed her to make the election which, by the writing, she reserved. This circumstance, however, is not considered decisive of the question in the view we have taken of it.

The expression with which the writing concludes—"as I intend it as a gift from me to him"—must of course be construed with reference to the previously expressed condition. It means simply that she intended it as a gift only in the event that she failed to collect it in her lifetime.

That this writing might, if established according to the requirements of the statute of wills, take effect as a testamentary disposition, cannot be doubted. But it is equally clear, upon the authorities cited, that it is ineffectual as a gift, although there are opposing authorities to be found in the decisions of other courts.

The judgment is therefore reversed, and the cause remanded for a judgment and further proceedings not inconsistent with the principles of this opinion.

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CASE 13—PETITION EQUITY—DECEMBER 22.

Jennings vs. Monks' Executor.

APPEAL FROM THE HANCOCK CIRCUIT COURT.

1. Where a testator not only authorized his executor to sell land, but devised to him the land itself, giving to the devisee only the proceeds when sold, an action for the recovery of the land should be in the name of the executor.

2. A conveyance by the owner of land passes the legal title to all the land within the designated boundaries, though they may contain more than the quantity mentioned in the deed.

3. In a judicial sale, and conveyance to the purchaser by commissioner, of a tract of land, described by metes and bounds as containing 174 acres, made in a proceeding to satisfy the debts of the owner, where the tract turns out to contain 214 acres,

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the commissioner's deed is not void as to the surplus, but passes the legal title to the whole tract.

4. In such case, where the vendee of the purchaser derived no benefit from the mistake, but, without notice of it, purchased and paid for all the land, including the surplus, he will be protected. (2 *Bibb*, 317; 1 *A. K. Mar.*, 72.)

KINCHELOE & JENNINGS, for appellant, cited 2 *Bibb*, 317; 1 *Mar.*, 73; *sess. acts* 1834-5, *page* 185; 12 *B. Mon.*, 276; 9 *B. Mon.*, 163; 4 *Mon.*, 271.

T. N. LINDSEY, for appellee, cited 1 *Mar.*, 364; 4 *J. J. Mar.*, 77; 2 *B. Mon.*, 68; 12 *B. Mon.*, 271.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The Legislature, in 1835, passed an act (*sess. acts*, 1834-5, *page* 185,) authorizing a sale of the lands of James Monks, deceased, for the payment of his debts, upon a proceeding in chancery to be instituted for that purpose by his administrator. In that proceeding commissioners, appointed in pursuance of the act, reported that the decedent's estate consisted of 333 acres of land, beside the land allotted to his widow, and the court decreed a sale of so much of said 333 acres as might be necessary to raise \$1,200. A commissioner, appointed for the purpose, sold 144 acres for \$656, and, at a subsequent day, offered for sale the residue, (which was supposed and represented by him to contain 189 acres,) or so much thereof as might be necessary to raise the balance of \$544; and J. R. Hamilton, for that sum, purchased 174 acres thereof, to be laid off in a certain mode designated by the commissioner. The land thus designated was surveyed under an order of court, and was conveyed by the commissioner to A. Hamilton, assignee of J. R. Hamilton, by metes and bounds, according to the surveyor's report. Afterward A. Hamilton's heirs conveyed said tract, described as containing 174 acres, and an adjoining tract, described as containing 150 acres, making together 324 acres, to J. R. Hamilton, who conveyed the same to J. S. Lander, one of the tracts being described in the deed as containing 174 acres, and the other as "containing at least 150 acres, supposed to be more." In 1855 Lander's heirs conveyed said two tracts to the appellant, Jennings, describing them as con-

taining together 371 acres. The commissioner's sale was made in 1837. In 1858, J. M. Monks, who was the sole heir of James Monks, and who became of age in 1851, brought this suit against Jennings, J. R. Hamilton, and the heirs of Andrew Hamilton, alleging that said tract, which had been supposed to contain only 174 acres, did in fact contain 214 acres; that he had only discovered the mistake within the last six months, that the mistake was apparent on the face of the papers, and was or should have been known to all the parties; that he did not seek to set aside the sale made by the commissioner, but was unwilling to surrender land that had not been sold nor paid for; and he prayed that defendants be required to relinquish the surplus of 40 acres, and for general relief. The plaintiff having died, the suit was revived in the names of his executor and devisee. It was proved that the tract contained 214 acres, and that J. M. Monks did not discover the mistake until about six months before he sued.

The court below, upon a demurrer by A. Hamilton's heirs dismissed the petition as to them, and, having caused 174 acres of the land to be surveyed in the mode designated by the commissioner when he sold to J. R. Hamilton, gave a judgment against Jennings in favor of J. M. Monks' executor for the surplus of 40 acres, from which Jennings appealed.

1. It is contended that, even if Jennings is not entitled to the land, the judgment is erroneous, because it is in favor of the executor instead of the devisee. But, as J. M. Monks not only authorized his executor to sell the land, but devised to him the land itself, giving to the devisee only the proceeds when sold, our opinion is that the judgment if otherwise right was properly rendered in favor of the executor.

2. It is contended that Jennings is entitled to hold the land because he purchased without notice of the mistake. On the other side it is contended, *first*, That he had notice of the mistake: *secondly*, That the commissioner's deed to Hamilton was void, at least as to the surplus, and, consequently, that Jennings acquired no title thereto.

Whether or not the petition sufficiently alleges notice of the

mistake we need not decide, because, even if it does, it is not sustained by proof of notice, actual or constructive. The only evidence of notice to Jennings is that furnished by the above mentioned deeds, under which he claims, and by the record of the proceedings under which the land was sold by the commissioner. That record, instead of showing that the tract purchased by Hamilton from the commissioner contained 214 acres, showed that it contained only 174 acres, and that the whole tract offered for sale by the commissioner only contained 189 acres. Nor do the deeds under which Jennings claims show the mistake. On the contrary, the deed from J. R. Hamilton to Lander, by describing this tract as containing 174 acres, and the other tract as containing at least 150 acres and probably more, furnished evidence to Jennings that the surplus was in the latter tract and not in the former.

As Jennings derived no benefit from the mistake, and, without notice of it, purchased and paid for all the land including the surplus, it is clear that the plaintiff was not entitled to any relief against him, if the commissioner's deed to Hamilton passed the legal title to the surplus land. (*Powell vs. Eve*, 2 *Bibb*, 317; *Floyd's heirs vs. Adams*, 1 *A. K. Mur.*, 72.) And it is equally clear, that a conveyance by the owner of land passes the legal title to all the land within the designated boundaries, though they may contain double the quantity mentioned in the deed.

But it is contended that this case stands upon a different footing, because the sale and conveyance were made not by the owner, but by a commissioner in a proceeding against him for payment of debts. We have seen no decision upon this question except the one appealed from. It has been decided by this court, in a number of cases, that a sale by an officer of more land than is necessary to pay the debt, for which the sale is authorized to be made, is void. But in all of those cases that we have seen, the quantity of land sold was known by the officer and purchaser; the error consisted in raising more money than the execution, judgment, or decree authorized, and it was an error shown by the record and capable of being corrected by it. In the case of *Walker and Wife vs. McKnight*,

(15 B. Mon., 476,) where an execution was issued and a sale made for the amount of the judgment, it was held that the sale passed the legal title to the purchaser, although a part of the debt had been made by a previous execution. The court said: "all sales of lands made by sheriffs would be rendered uncertain, if the principle were established that the sale would be void if any part of the debt had been paid, although such payment did not appear upon the execution. No person would be willing to purchase at such a sale, and the operation of the rule would be detrimental instead of advantageous to the defendant in the execution." Similar reasons forbid the adoption of a rule which would render judicial sales void, because of a mistake as to the quantity of the land. The impropriety of such a rule is illustrated, in the case under consideration, by the fact that the land sold by the commissioner to Hamilton was surveyed under an order of court, and reported by the surveyor as containing 174 acres, and was conveyed in accordance with that report.

There is perhaps no substantial difference in principle between this case and that of *Floyd's heirs vs. Adams*, above cited. In that case Floyd, having agreed to convey to Trigg 1,000 acres of land on Elkhorn, the place where McClellan's fort stands, died, leaving a will whereby he directed his executors to convey to Trigg's heirs "one thousand acres of land in Fayette, known as the Royal Spring tract." In a suit brought by Cobb, assignee of Trigg, against Trigg's heirs and Floyd's executors, the court ordered Floyd's executors to convey said land to Cobb, and a conveyance was accordingly made by them. It was afterward discovered that the tract contained over 2,000 acres, and Floyd's heirs sued Cobb's vendees for the surplus; but the court, instead of holding that the conveyance made by its order was void, and thus remitting the defendants back to the bond from Floyd to Trigg, which would have given them a right to only 1,000 acres, held that the conveyance invested Cobb with the legal title to all the land in the tract.

In our opinion the commissioner's deed to Hamilton passed the legal title to the 214 acres, and the plaintiffs are entitled

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to no relief against Jennings, who purchased without notice, and derived no benefit from the mistake.

As Monks' executor has not appealed from the judgment dismissing the petition as to A. Hamilton's heirs, as there was no decree as to J. R. Hamilton, and as Lander's heirs are not parties to the suit, there is no question before us as to the executor's right to recover compensation from any of those parties.

The judgment is reversed, and the cause remanded, with directions to dismiss the suit against the appellant.

CASE 14—PETITION ORDINARY—DECEMBER 23.

Hanson vs. Bowyer.

APPEAL FROM THE FAYETTE CIRCUIT COURT.

1. A judgment, giving priority to one creditor over another, as to attached funds of a debtor, which does not distribute the fund, nor give any other relief to either of the parties, is not a final order. (*Bondurant vs. Apperson, ante.*)

2. An order sustaining an attachment, made before final hearing, is not a final order, and is not the subject of an appeal. (*Bondurant vs. Apperson, supra; Civil Code, secs. 285, 291, 292; 14 B. Mon., 195.*)

HUNT & BECK, for appellant, cited *Civil Code, sec. 292; 17 B. Mon., 149.*

R. H. PREWITT, on same side.

GEO. B. KINKEAD, for appellee.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT: (Judge Peters did not preside in this case.)

Bowyer attached funds of Hanson in the hands of Prewitt, upon an affidavit that Hanson was a non-resident, &c. Payne, Prewitt and Wickliffe each asserted a claim to the fund. It was adjudged that the attachment of Bowyer be sustained; that his debt should be paid before that of Payne, and that

Payne's debt should be paid before that of Prewitt; but that, as Wickliffe's claim is said to be superior to all the others, the fund shall be held undistributed until Wickliffe's claim shall be adjudicated upon. There was no personal judgment against Hanson, nor could any have been rendered, as he had not been summoned nor appeared.

The judgment giving priority to Bowyer over Payne and Prewitt, and to Payne over Prewitt, is not a final order, as it did not distribute the fund, nor give any other relief to either of the parties. (*Bondurant vs. Apperson*, decided at the last term, and cases cited.)

Nor is the order sustaining the attachment a final order. The decisions above referred to make this entirely clear, unless the order is made final by the provisions of the Code. Section 285 declares that, "an attachment obtained at the commencement of the action shall be sustained or discharged at the time that judgment is rendered in the action." Section 291 authorizes the defendant to move for a discharge of the attachment, at any time before it is sustained; and section 292 declares that an order sustaining or discharging an attachment, on the rendition of judgment in the action, shall be the subject of appeal. It seems clear that the framers of the Code did not intend to authorize an appeal from a preliminary order sustaining an attachment. This was, in effect, decided in the case of *Talbot vs. Peirce*, (14 B. Mon., 195,) in which it was held that a judgment overruling a motion to discharge an attachment was not final, and, consequently, that the court might, notwithstanding such judgment, and without additional evidence, discharge the attachment on final hearing. There is no substantial difference between a preliminary order sustaining an attachment, and a preliminary order overruling a motion to discharge the attachment. Neither amounts to anything more than an opinion that the attachment should be sustained; and, notwithstanding such an expression of opinion, the attachment may be discharged on final hearing. In the case under consideration the court withheld a final decision and retained control over the fund, on account of Wickliffe's claim. It may be that, on final hearing, the fund will be ad-

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judged to Wickliffe, which would in effect defeat the attachment; or it may be that Hanson, before final hearing, may file an answer, as he certainly has a right to do, and show that the debt has been paid, which would result in a discharge of the attachment. Whether or not Hanson will be prejudiced by the order sustaining the attachment, and, if prejudiced, in what manner and to what extent, depends upon the future action of the court.

The appeal is dismissed.

CASE 15—PETITION ORDINARY—JANUARY 8.

Hutchings vs. Moore.

APPEAL FROM THE DAVIES CIRCUIT COURT.

1. Whether covenants are to be treated as dependent or independent, is a question of construction, which must be determined by the intention of the parties to be ascertained from the whole instrument

2. Where a contract to convey land, and the contract to pay therefor, are mutual executory agreements, not dependent upon each other, the non-performance of the one cannot be pleaded in bar to an action brought for the breach of the other. (1 *Bibb*, 454.)

3. In a sale of a tract of land the bond, executed to the purchaser, recited that a certain sum was to be paid on the 1st of March next after the date of the writing, and the residue in two annual instalments, for which the purchaser executed his notes, absolute in their terms. The bond stipulated that possession was to be given on a named day, and a deed to be made with general warranty "when the first payment is made." Suit was brought upon the note given for the last instalment of the purchase money, the first payment having been made, the vendor having failed to make the deed. *Held*, That the contract to convey and the contract to pay are mutual executory agreements, not dependent upon each other. The failure to convey cannot avail as a *defense* to defeat the action.

4. A defendant is not required to *denominate* his answer a counter-claim when the facts as presented constitute a cause of action against the plaintiff, arising out of the transaction set forth in the petition, &c., "with an appropriate prayer for relief." But it must contain all the requisites of a petition founded on the same cause of action.

5. Sale of a farm "containing 160 acres, more or less," particularly described as

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the bond for a conveyance, for the consideration of \$6,400, "being at the rate of forty dollars per acre," (as the bond recites,) *held* to be a sale by the acre, and not in gross, and the purchaser liable to pay for a surplus of eleven and a half acres contained in the tract—he cannot surrender the surplus land to his vender.

6. It has been held that in the sale of a tract of about 135 acres, a deficit of two acres was large enough, considering the price of the land, (\$30 per acre,) to entitle the purchaser to relief. (*Reed vs. Quisenberry*, *Ms. opin.*, winter term, 1849.) *Argu.*

7. A defendant, sued for compensation for surplus in a tract of land purchased of the plaintiff by the acre, states in his answer that he "has not enough knowledge or information to constitute a belief whether there is $11\frac{1}{2}$ acres of surplus land, above the 160 acres, and denies that he is indebted" on account of said surplus, &c. *Held* equivalent to a denial of "any knowledge or information thereof sufficient to form a belief." (*Civil Code*, sec. 125.)

GEO. H. YEAMAN, for appellant, cited 2 *Bibb*, 270; 4 *Bibb*, 81; 1 *Mar.*, 193; 4 *Mon.*, 269; 2 *Dana*, 6, 258, 266.

SWEENEY and WALL and RAY, for appellee.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

Moore sold to Hutchings, by executory contract, a farm described in the bond as "containing one hundred and sixty acres, more or less, being the same land conveyed to me by Peter Funk," whose conveyance is referred to, "to ascertain more particularly the metes and bounds of the land." "The consideration is six thousand four hundred dollars, being at the rate of forty dollars per acre," of which \$2,500 was to be paid on the 1st March next after the date of the writing, and the residue in two annual instalments, for which Hutchings executed his notes. It was further stipulated that Moore was to give possession on the 20th March, 1860, and would "make a deed with clause of general warranty when the first payment is made."

The action was brought by Moore to recover on the note given by Hutchings for the last installment of the purchase money, and also to recover \$460, being the value of a surplus of $11\frac{1}{2}$ acres, at \$40 per acre, which it is alleged is contained in the tract, as ascertained by survey, a plat and certificate of which were filed with the petition.

Hutchings answered, setting up the following matters of defense:

1st. That although he had made the first payment for the

land, the plaintiff had wholly failed to make him a deed, as stipulated in the bond, and could not, therefore, recover on the note.

2d. That the sale was not by the acre, but in gross, and, therefore, he ought not to be compelled to pay for the alleged surplus.

3d. That he had not "enough knowledge or information to constitute a belief, whether there is $11\frac{1}{2}$ acres of surplus land."

4th. That if there should be any such surplus he tenders the same to the plaintiff, and offers to surrender and relinquish all claim thereto.

To this answer the plaintiff demurred, the demurrer was sustained, and judgment was rendered in favor of the plaintiff for both the sums claimed, to reverse which the defendant has appealed.

In regard to the *first* ground of defense relied on there can be no difficulty. The contract to convey the land and the contract to pay therefor, are mutual executory agreements, not dependent upon each other, and the non-performance of the one cannot be pleaded in bar to an action brought for the breach of the other. (*McC Campbell, &c. vs. Miller, 1 Bibb, 454.*) Whether covenants are to be treated as dependent or independent, is a question of construction, which must be determined by the intention of the parties, to be collected from the whole instrument, and there is nothing in this case to authorize the conclusion that it was in the contemplation of either party that the payment of the last two instalments of the purchase money, for which separate notes were given, absolute in their terms, was to depend on the appellee's compliance with his separate obligation to convey the title at the time fixed.

It is to be remarked, in this connection, that the alleged breach, by the appellee; of his covenant to convey, was set up merely as matter of defense to the action, and not as a ground of relief by way of *counter-claim*. Indeed he asserts no *claim* founded on the alleged non-performance of the appellee, asks for no relief in consequence of it, but relies on it for no other

purpose, and ascribes to it no other effect than that of defeating the recovery sought by the appellee. It has been decided by this court that a defendant is not required to *denominate* his answer a counter-claim when the facts as presented constitute a cause of action against the plaintiff, arising out of the transaction set forth in the petition, &c., "*with an appropriate prayer for relief.*" (*Branaman vs. Perkins, Mss. opin.*, 1856.) And it has also been decided, in several cases, that a counter-claim is substantially a cross-action by the defendant against the plaintiff, and that an answer setting forth a *counter-claim* must contain all the requisites of a petition founded on the same cause of action. (2 *Met.*, 340; *Mss. opin.*, June, 1858.) One of the requisites of a valid petition, as defined by the Code, is "a demand of the relief to which the plaintiff considers himself entitled." (*Sec. 118, sub-sec. 4.*) Of course we would not be understood as intimating that this provision operates to restrict the plaintiff to the relief demanded.

The court below, therefore, did not err in deciding that the portion of the answer we have been considering was insufficient either to defeat the action, or as a valid counter-claim.

2. That this was a sale, not in gross, but by the acre, is, we think, so evident, upon the face of the bond, that an argument to render the point more clear would be useless. It was the intent of the parties to sell, on the one hand, and to purchase, on the other, *the farm* of the appellee, which is particularly described in the bond, and which was supposed to contain 160 acres, for the consideration of \$8,400, "being at the rate of forty dollars per acre." These latter words are utterly without meaning, except upon the hypothesis that the parties intended them to indicate the character of the sale, and to declare in terms that the sale was by the acre, and not by the tract.

If then, as alleged, the tract contains a surplus of eleven and a half acres, worth, at the stipulated price per acre, four hundred and sixty dollars, the appellee is unquestionably entitled to compensation for such excess. It is only necessary to add, in relation to the *fourth* ground of relief set up in the answer, that the appellant's offer to surrender the surplus land

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was very properly rejected. In the case of *Reed vs. Quisenberry*, (*Ms. opin.*, winter term, 1849,) it was decided that, in the sale of a tract of about 135 acres, a deficit of two acres was large enough, considering the price of the land, (\$30 per acre,) to entitle the purchaser to relief.

3. We are of opinion, however, that the allegations of the petition, with respect to the quantity of the surplus, was sufficiently contraverted by the answer, and for that reason the demurrer should not have been sustained. The language of the defendant on this point is: he "has not enough knowledge or information to constitute a belief whether there is $11\frac{1}{2}$ acres of surplus land, above the one hundred and sixty acres, and denies that he is indebted" on account of said surplus, &c. This, we think, is equivalent, upon a fair interpretation of the language, to a denial of "any knowledge or information thereof sufficient to form a belief." (*Code, sec. 125.*)

For the error indicated the judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

CASE 16—PETITION ORDINARY—JANUARY 16.

Barnes vs. Turner.

APPEAL FROM THE MORGAN CIRCUIT COURT.

1. The second and fourth sections of chapter 42 of the Revised Statutes, (title GAMING,) secure to the loser and his creditor the right to sue for money or property lost at gaming, for five years, and the exclusive right to do so for six months, after which any other person may sue for its recovery within the five years; the one first suing to have the preference.

2. If the loser or his creditor sues, the recovery will only be the amount lost, and be for the sole benefit of the party suing. If another sues, the recovery will be treble the amount lost and won, one-half to the use of the plaintiff, the other to the commonwealth.

3. Although more than six months may have elapsed, the loser has the right to

adjust the loss by private arrangement with the winner, if no other person has commenced suit. If the transaction be made in good faith by both parties, and free from any device to evade the statute, both the winner and loser should be protected.

4. The 2d sec. of art. 22, chap. 28, *Revised Statutes*, (1 Stanton, 406,) does not apply to the case *supra*.

SIMPSON & SCOTT, for appellant, cited *Revised Statutes*, chap. 42, secs. 2 and 4; *Ib.*, chap. 28, art. 22, sec. 2.

JUDGE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Barnes sued Turner to recover \$1,800, which he alleges Turner had won of Cox at cards, within the last five years, and more than six months previous.

Turner denied having so won more than six or seven hundred dollars; also set up as a defense that, recognizing Cox's right to recover, that he and Cox, before the bringing of the suit, had settled the matter, and he had paid Cox the full amount won; that this arrangement was made in good faith, with no design to evade the laws against gaming.

Cox was the only witness. Without setting out his evidence, we say it tended to prove that Cox, being in low pecuniary circumstances, whilst Turner was independent, believing the money could be recovered, Turner proposed a settlement, preferring that Cox, rather than any one else, should have it. The parties did settle, and Turner executed his note to Cox for eight hundred dollars, which he partly paid to Cox and his creditors before the bringing of this suit, and the remainder afterward, but before the trial. Thus this covered the full amount of what had been so won of him during the last five years, and some of previous date. That he, Cox, did not know any one intended bringing suit; Turner said some person had been writing to Maysville about his having won money from witness. That this settlement was made in good faith, and not to evade the statute against gaming.

After this evidence was through, the plaintiff asked the court to instruct the jury: "If the jury believe from the evidence that, after Cox and Turner had played, and Cox and Turner had a reckoning as to the amount that Turner had won, and it was agreed to be about \$800, that T. had won and received of C., and that T. agreed to pay back to C., the \$800—and

executed his note for \$800—the law is for plaintiff twice the amount of said sum of \$800; provided they believe that \$800 was the sum received by T., from C., or so of any greater or less sum; and, provided further, they believe that said reckoning took place after the expiration of six months from the winning and receipt of the money by T.”

The court refused this, and instructed: “If the jury believe from the evidence that the defendant, within five years before the action was begun, at a game or games of cards, won and received from N. W. Cox money or property of the value of five dollars or upwards, within the space of twenty-four hours, the law is for the plaintiff, and the jury must so find for him three times the value of the money or property they believe, from the evidence, the defendant so won and received of him within five years before the action was begun. Unless the jury should believe, from the evidence, that the defendant, in good faith and not to evade the gaming laws, recognized the right of the loser to be restored to the value of the thing by him so won, and the loser recognizing his right to recover and receive it back, *bona fide* made a settlement of it, and the defendant executed to the loser his note for the full amount so won and received; and the loser, recognizing his right to recover and receive it, did receive it in full of the same, and it was in full, which has been since, in good faith, and not to evade the gaming laws, paid, a part before the suit was begun and a part since, then the law is for defendant, and the jury must find for him. But, if they believe, from the evidence, the settlement and payment, between Turner and Cox, was not *bona fide* made, but was merely a device to evade the gaming laws, then the law is for the plaintiff, and the jury must find for him.”

The jury returned a verdict for the defendant. Plaintiff moved for a new trial, which was overruled, and the plaintiff appealed.

By the second section of our statute against gaming the loser, or any of his creditors, may recover back money or property lost at cards within five years.

By the fourth section, if the loser, or his creditors, do not sue within six months, any other person may sue the winner, and recover treble the amount lost, if the suit is brought within five years. One-half so recovered shall be for the person so suing, the other for the commonwealth. The loser, creditor, or other person first suing, after the six months, to have the preference. (1 *Stanton's Revised Statutes*, page 561-2-3.)

This statute, when correctly analyzed, secures to the loser and his creditor the right to sue for the lost money or property for five years, and the exclusive right to do so for six months, after which any other person may sue for its recovery, the one first suing to have the preference; with this difference, however, that, if the loser or his creditor sues, the recovery will only be the amount lost, and for the sole benefit of the loser or his creditor, whichever may bring the suit,—if any other person sues, the recovery will be treble the amount lost and won, one half to the use of the plaintiff, the other to the commonwealth.

Cox, still having the right to sue for five years, if no other person had commenced suit, he had the right to adjust the matter by private arrangement, provided he did this in good faith to get back what he had lost, and not as a device to evade the statute. As the recovery would enure to his benefit on any suit he might bring, he violated no law, nor public policy, by a recovery of his rights without suit; and, if the transaction was made in good faith by both parties, and free from any device to evade the law, both the winner and loser should be protected.

There is nothing in the second section, twenty-second article, (1 *Stan., Rev. Stat.*, page 406,) which changes, or in any manner modifies, the rights of these parties, or alters the first recited statute.

There was no error in giving or refusing instructions, nor in the finding of the jury. Wherefore the judgment is affirmed.

Duncan vs. Wickliffe.

CASE 17—PETITION ORDINARY—JANUARY 17.

Duncan vs. Wickliffe.

APPEAL FROM THE MUHLENBURG CIRCUIT COURT.

1. The filing of an affidavit by the defendant controverting the ground upon which an attachment issued, and praying for a discharge thereof, is an appearance to the action. The attachment authorized by *section 221 of the Civil Code* is a provisional remedy in a personal action. It is not distinct and cannot be separated from the action. They constitute but one proceeding.

2. In *section 289 of the Civil Code*, which declares that the affidavit of the plaintiff upon which the attachment is issued, and the affidavit of the defendant controverting that of the plaintiff, shall be regarded as the pleadings in the attachment, the words, "*and have no other effect*," were introduced merely for the purpose of preventing the affidavits from being regarded as evidence.

3. Where no motion was made in the court below to correct a clerical misprision, it cannot be complained of in the court of appeals.

JOSEPH RICKETTS and B. E. PRITMAN, for appellant, cited *Civil Code, sec. 289.*

C. EAVES, for appellee.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Wickliffe sued Duncan, by an ordinary petition, filed March 27, 1862, to recover the amount of a note executed by Duncan to Wickliffe; and upon an affidavit that Duncan was a non-resident obtained an attachment of his property. At the ensuing term of the court, and after the lapse of more than 20 days from the filing of the petition, Duncan filed an affidavit, in which he denied that he was a non-resident, and prayed for a discharge of the attachment. Afterward, at the same term, no answer to the petition having been filed by Duncan, and process not having been served, a personal judgment was rendered against him for the amount of the note, from which he appealed.

The only question is, whether or not the filing of the affidavit, to procure a discharge of the attachment, was an appearance to the action.

The attachment authorized by *section 221 of the Code* is not merely a proceeding *in rem*, like that authorized by the act of 1837, (3 S. L., 12,) and by the act of 1838, (3 S. L., 116.) The

attachment authorized by said section is a provisional remedy in a personal action. It is not distinct, and cannot be separated from the action. If the petition shows no cause of action, or if the cause of action which it states is successfully controverted, the attachment must be discharged. It may, therefore, be assumed that a defendant desiring to controvert an attachment will present his defense to the action, if he has any. His motion to discharge the attachment, without presenting a defense to the action, authorizes the inference that he has no defense to the action.

Section 289 of the Code declares that the affidavit of the plaintiff, upon which the attachment is issued, and the affidavit of the defendant, controverting that of the plaintiff, "shall be regarded as the pleadings in the attachment, *and have no other effect.*" It is believed that the words which we have italicized were introduced merely for the purpose of preventing the affidavits from being regarded as evidence.

Section 450 declares that "no personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this State, as provided in section 86, and who has not appeared in the action;" from which it is evident that the framers of the Code contemplated that a personal judgment might be rendered against a defendant constructively summoned, if he appeared in the action.

Section 761 declares that, "in an action where an attachment has been granted, the execution by or for the defendant of a bond whereby the attachment is discharged, or the possession of the attached property is obtained or retained by him, shall be an appearance of such defendant in the action." We perceive no reason for making the execution of such a bond an appearance to the action, which does not equally apply to the filing of an affidavit controverting the attachment. The execution of the bond, being an act *in pais*, would not have been an appearance to the action, if it had not been so declared by the statute. The fact that it was so declared shows that the framers of the Code regarded the action and the attachment as constituting but one proceeding. And, in accordance with this view, it has been decided by this court, that an

attachment may issue upon the statement of the proper facts in the petition, if sworn to, and that in such case a separate affidavit is unnecessary; (*Scott vs. Doneghy*, 17 B. Mon., 321;) and that where an attachment has been issued upon a separate affidavit of the plaintiff, it may be controverted by the answer of the defendant, without a separate affidavit; (*Talbot vs. Pierce*, 14 B. Mon., 195;) and, finally, that an appeal to this court, by a defendant constructively summoned, from a judgment sustaining an attachment, is an appearance to the action, which, upon the return of the cause, would authorize a personal judgment against him, unless he make a defense to the action by answer or demurrer. An appeal from a judgment sustaining an attachment, being an appearance to the action, it seems to follow, necessarily, that a motion to discharge the attachment, or the filing of an affidavit controverting the attachment, is entitled to the same effect.

There is perhaps no just foundation for the apprehension expressed by counsel that, if a defendant cannot resist a wrongful attachment, without subjecting his person to the jurisdiction of the court, parties may frequently obtain wrongful attachments for the purpose of giving to the court personal jurisdiction over the defendant; because a person cannot act thus without rendering himself liable for damages.

Whether or not a defense by a defendant constructively summoned, acting through an attorney appointed by the court, under *section 440 of the Code*, would be an appearance to the action, is a question not now before us, and upon which we express no opinion.

Duncan did not ask for a continuance, nor for time to present an answer, nor object to the rendition of the judgment. Consequently, we need not decide whether or not the rendition of the judgment, at the same term at which he appeared, was erroneous; because, if erroneous, it was a clerical misprision, (*Code, section 578.*) and cannot be complained of here, as no motion was made to correct it in the court below. (*Code, sec. 580.*)

The judgment is affirmed.

Caldwell, Hunter & Co. vs. Dawson.

CASE 18—PETITION ORDINARY—JANUARY 17.

4m121
108 377

Caldwell, Hunter & Co. vs. Dawson.

APPEAL FROM THE HARDIN CIRCUIT COURT.

1. In a contract in writing for the delivery of a specified quantity of charcoal, at a fixed price, if the purchaser receive more than he is entitled to, he must pay for the excess what it is worth, whether he had knowledge of it or not.

2. In a suit upon such contract, to entitle the plaintiff to recover for the excess, the petition should allege the value thereof.

3. Congress has not passed a law to fix the standard of weights and measures as it is authorized to do by the Constitution. The laws of the State must, therefore, govern the subject. See acts of the General Assembly adopting the standards furnished by the Secretary of the Treasury under a resolution of Congress. (*Act of 1839, 3 Stat. Law, 583; Rev. Stat., chap. 105, sec. 1.*)

4. According to the standard *supra*, a bushel is a measure containing 77.6274 pounds avoirdupois of distilled water at the temperature of the maximum density of water and barometer 30 inches at 62 dg. Fahrenheit. (*Homan's Cyclopedia of Commerce, page 1943.*) This is the same as the Winchester bushel, and contains 2150.42 cubic inches.

5. Where a contract for the sale of charcoal, by the bushel, designated the place at which it was to be made, which the seller was to deliver at the furnace of the purchaser, the place of measurement is at the place of delivery; and the delivery being by wagon the mode of ascertaining the quantity should be by gauging the contents of the wagon at the place of delivery, unless another mode was provided by contract, or established by usage.

6. There is a strong and increasing disinclination of the courts to allow the general laws of the country to be varied by proof of local usages. Such an usage is binding only on the ground that the party, sought to be charged, contracted with reference to it. It must appear that he had actual knowledge of it, or the evidence must be such as to clearly authorize the presumption that he had knowledge of it.

7. To make such a custom admissible it must be of such age, such uniformity of observance, such certainty and fixedness of character, and of such notoriety, that a jury would feel clear in saying that it was known to the party sought to be affected by it. (*1 Met., 562.*)

8. The fact that one party had knowledge of the usage, and supposed it would enter into the contract, is not sufficient, nor can it enter into the contract, though both parties had knowledge of it, if it appears they did not contract with reference to it.

JOHN E. NEWMAN, for appellants, cited *New American Cyclopedia, title "Bushel;" Tomlin's Law Dictionary, title "Bushel, or Measure, or Weight;" 2 Stat. Law, 1535; 1 Met. K., 562; 5 Dana, 503; Chitty's Pleading, 219.*

CHAS. G. WINTERSMITH, for appellee, cited *sec. 1 act of 1798; 2 Stat Law, Ky., page 1535.*

Caldwell, Hunter & Co. vs. Dawson.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Dawson made two contracts with the appellants, one in March, 1851, the other in January, 1852, by each of which he agreed to deliver to them, at the Crooked Creek Furnace, in Bullitt county, 50,000 bushels of good charcoal, for which they agreed to pay him $3\frac{1}{2}$ cents per bushel. Dawson sued upon said contracts, alleging that he had delivered 69,576 bushels under the first, and 56,887 bushels under the second contract; and that the appellants had not paid him therefor, but owed him a balance of \$800 over and above what he had received from them under said contracts, for which he asked judgment. A demurrer to the petition having been overruled, the appellants filed an answer and counter-claim and an amended answer, in which they denied that Dawson had delivered the quantity of coal alleged by him, and stated that they had no knowledge nor information to form a belief as to the quantity he had delivered; and alleged that they had paid him, in money and merchandise, \$3,522.46, which more than paid him for all coal delivered under said contracts; and asked for a judgment against him for such sum as might be found in their favor upon trial. Dawson filed a reply, admitting that he had received pay for all the coal set forth in the petition except the amount of \$800, which was, in effect, an admission that he had received more than the appellants alleged. Dawson obtained a verdict and judgment for \$786.69, from which judgment this appeal was taken.

Upon the trial the defendants asked for an instruction, "that the plaintiff cannot recover in this action for more than 100,000 bushels of charcoal, that being the amount specified in the two written contracts sued on;" and for another instruction, that "the plaintiff cannot recover in this case for more than 100,000 bushels, unless the defendants had knowledge of the delivery of the excess, and in such knowledge received the same," both of which were refused. In our opinion, if the defendants received more coal than they were entitled to, they should pay what it was worth, whether they had knowledge of the excess or not. But the petition laid no foundation for such recovery. It declared upon the contracts, which entitled the plaintiff to only \$3,500, as pay for 100,000 bushels, and

contained no allegation as to the value of the coal, and the reply admits that the plaintiff had been, paid for the 100,000 bushels. The plaintiff should have been allowed to amend his petition, but upon the pleadings as they stand he was not entitled to recover.

As the plaintiff will probably amend his petition upon the return of the cause, it is proper to notice other questions arising upon the record. Upon the trial the principal question was how much charcoal had been delivered. The defendants filed a statement showing the number of wagon loads received. The difficulty was to determine how many bushels the wagon contained.

Congress has not passed any law to fix the standard of weights and measures, as it is authorized to do by the Constitution. The laws of this State, therefore, govern the subject. But Professor Hassler, who was employed for that purpose by the Secretary of the Treasury, under a resolution of the Senate, adopted May 29, 1830, prepared standards of weights and measures, for the use of the custom houses; and by a joint resolution of Congress, adopted June 14, 1836, the Secretary of the Treasury was directed to furnish a complete set of those weights and measures to the Governor of each State, "to the end that a uniform standard of weights and measures may be established throughout the United States." These standards were adopted by the Legislature of Kentucky, by an act passed in 1839, (3 S. L., 583,) and by *chap. 105, sec. 1, of the Revised Statutes*, which declares that "the weights, measures and balances received from the government of the United States, now in the custody of the Secretary of State, shall continue in the custody of that officer, and shall be the standard of weights and measures in this State." According to this standard, a bushel is a measure containing 77.6274 pounds avoirdupois of distilled water at the temperature of the maximum density of water and barometer 30 inches at 62 dg. Fahrenheit. (*Homan's Cyclopedia of Commerce*, page 1943.) This, as is stated in Professor Alexander's "universal dictionary of weights and measures," is the same as the Winchester bushel, and contains 2150.42 cubic inches.

The contracts between the parties designated the place at

which the charcoal was to be made, and bound Dawson to deliver it at the furnace of the appellants. There was evidence that the hauling of it caused it to settle, so that at the latter place it occupied only four-fifths of the space which it filled at the former. Our opinion is that the appellants were entitled to 100,000 bushels, by level measure, at the place of delivery. Upon this point the counsel for the parties agree, but they differ as to the number of such bushels that were delivered. The appellants filed a statement, the correctness of which was conceded, showing the number of wagon loads they had received. The dispute is as to the number of bushels contained in the wagon, and as to the mode of ascertaining the same, the appellants insisting upon *gauging* the contents of the wagon at the furnace, the appellee insisting upon what the witnesses call "dust-measure." A bushel, according to "dust-measure," is composed of a half bushel heaped and a half bushel filled to the level, at the pit where the coal is made, coal dust being used because the measurement can be made more accurately with it than with lumps of coal.

Several witnesses testified that "dust-measure" at the pit would produce the same result as gauging the contents of the wagon at the place of delivery. One witness, Pittman, testified that he had ascertained the contents of the wagon by "dust-measure" at the pit, and the verdict of the jury appears to have been based upon his estimate. The evidence of Gunter and several other witnesses, who gauged the wagon, conduced to prove that it contained less than Pittman asserted. It is evident that Pittman made a mistake in measuring the coal-dust which the wagon contained; or that Gunter and several other witnesses made a mistake in measuring the wagon; or that Whitman and three other witnesses made a mistake in supposing that the two modes of measuring would produce the same result.

In our opinion, the appellants were entitled to insist upon the latter mode of measurement, unless they agreed to the former mode, or unless the adoption of that mode was established by usage.

There was no evidence of such an agreement. On the

contrary, Whitman testified that, when the first contract was made nothing was said about the mode of measuring; and that before the making of the second contract he, an agent of the appellants, told Dawson that they would insist on gauge measure. The fourth instruction for the plaintiff was erroneous, because it assumed that there was evidence conducing to prove that "dust measure" was "the mode of measuring coal understood by the parties in making the contract."

There was evidence conducing to prove, that during eight or ten years before the appellants purchased the furnace, its previous owners usually purchased charcoal according to "dust measure." But Whitman proved that the appellants rejected that mode and adopted gauge measure, and there was no contradictory evidence upon that subject, nor was there any proof, except the evidence of the former usage, that the appellants, when they made the first contract with Dawson, had any knowledge of that usage, or any reason to believe that Dawson contracted with reference to it; whilst Whitman proved, that, before the making of the second contract, Dawson was informed that the appellants would insist on gauge measure. The general current of recent decisions shows a strong and increasing disinclination of the courts to allow the general laws of the country to be varied by proof of local usages. (Such an usage is binding only on the ground that the party, sought to be charged, contracted with reference to it. Hence it must appear that he had actual knowledge of it, or the evidence must be such as to clearly authorize the presumption that he had knowledge of it, otherwise it cannot be supposed that he contracted with reference to it. The general doctrine on this subject was thus stated in a recent case: "To make such a custom admissible it must be of such age, such uniformity of observance, such certainty and fixedness of character, and of such notoriety, that a jury would feel clear in saying that it was known to the party sought to be affected by it. (*Huston, &c vs. Peters, &c.*, 1 Met. K. R., 562.) The fact that one party had knowledge of the usage, and supposed it would enter into the contract, is not sufficient, nor can it enter into the contract, though both parties had knowledge of it, if it appears that they did not contract with reference to it. The

first instruction for the plaintiff was erroneous: 1st. Because it did not discriminate between the first and second contracts. There was clearly no evidence authorizing the jury to find that the alleged usage entered into the second contract. 2d. Because the jury were told that "the usual mode of measuring coal at the Crooked Creek Furnace, at the time of the contract," was the proper mode. There was, we believe, no evidence as to what was the usual mode of measuring coal at that furnace at the time of the first contract. The plaintiff's evidence as to the usage related to the previous time, during which Baker and Quirey and Tyler owned the furnace. The instruction, in effect, assumed that the former usage continued to exist, and was binding on the appellants, though they may not have contracted with reference to it, and may not have had any knowledge of it, actual or implied.

It is argued by appellants' counsel, that the court should not have permitted the jury to consider the evidence of the usage during the proprietorship of Baker and Quirey and Tyler, even with reference to the first contract, because, as is asserted, the appellants during that time were strangers, residing at a distance from the Crooked Creek Furnace, and consequently could not rationally be presumed to have had any knowledge of the usage. We need not express an opinion upon this point, because no motion was made to exclude the evidence, and it was not proved that the appellants, during the time referred to, were strangers, residing at a distance. It seems unnecessary to notice the other questions argued by counsel.

The judgment is reversed, and the cause remanded for a new trial and other proceedings, not inconsistent with this opinion.

CASE 19—PETITION ORDINARY—JANUARY 23.

Taylor vs. Moran.

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119 876

APPEAL FROM THE MASON CIRCUIT COURT.

1. *Sections 111 to 114, inclusive, of the Civil Code*, which relate to the joinder of actions, refer to causes of action existing at the time of the commencement of the suit, and not to such as arise subsequently.

2. *Sections 159 to 162, inclusive, of the Civil Code*, relating to amendments, authorize such as relate to the case actually in court, and not such as constitute an entirely new and distinct case. The facts alleged must be "material to the case," which serve to explain or perfect the cause of action originally stated, and not such subsequently occurring facts as form a separate ground of action, having no connection with the original cause of action, and not necessary to enable the party to recover on it.

3. Slanderous words, of similar import with those declared on, spoken after the commencement of the action, cannot be relied upon in such action either as a distinct ground of recovery, or to show that the words charged had been spoken, or to enhance the damages to which the plaintiff may be entitled on the original cause of action, but simply and merely to show the *intent* with which the words charged were spoken, and, when given in evidence, the court should give such cautionary directions to the jury as to restrict their effect upon the verdict within the legitimate purpose of their admission.

4. In an action of slander, words spoken pending the action, and set up in an amended petition, were admitted in evidence without objection or any admonition to the jury as to the weight or effect they were to give to them; the court instructed the jury that the plaintiff had a right to recover, as well for slanderous words spoken after as before the action was brought, and that in determining the amount of damages they were to consider *all the facts and circumstances proven in the case*; the case was submitted to the jury and argued by counsel, after which the court said to the jury, in another instruction, that the plaintiff could not recover in this action for words uttered since the filing of the original petition, but that evidence thereof was admissible on the question of malice, and that they could not regard the words as *substantive slanders*, for which they might give damages in the action. *Held*, That the error was not cured by this caution. It should have been full and explicit as to the purpose for which alone the evidence was admissible, embracing specifically the idea that such evidence could not be considered by them to increase the damages.

5. The specific words in which the slander is conveyed must be set forth in the petition, and it is not sufficient to state merely the *effect* of the words uttered, or that the defendant charged the plaintiff with the commission of a particular crime.

6. The rule of evidence in actions of slander formerly was that the plaintiff must prove the precise words. That rule has been no further relaxed than to admit proof of the substance of the words. It is not enough to prove words of the same effect or import, or conveying the same idea. The words must be substantially the same words, and it is not sufficient that they contain substantially the same *charge*, but in different phraseology; equivalent words of slander will not do.

7. While the proof of speaking the words is for the jury, the correspondence between the words spoken and laid is for the court.

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T. A. MARSHALL, for appellant cited *Campbell vs. Thompson*, *Ms. opin.*, winter term, 1858; 15 *B. Mon.*, 102.

CONWELL & WHITAKER, on same side, cited 1 *Starkie on Slander*, 253, 329; *Starkie's Evidence*, 862; *Saunders' Pleading and Evidence*, 336, 329; *Smith's American Leading Cases*, 146, 147; 5 *Printed Reports*, (N. Y.) 171; *N. Y. Code Rep.*, 247; 2 *A. K. Mar.*, 481, 3; 3 *Dana*, 141; *Hardin*, 167; 3 *Bibb*, 374; 4 *Bibb*, 45, 192; 1 *B. Mon.*, 214.

W. H. WADSWORTH, for appellee, cited *Civil Code*, secs. 159, 162; 1 *Met.*, 665; 1 *Bibb*, 165; 4 *Ib.*, 515; 1 *Dana*, 529; 5 *Mon.*, 560; 7 *Mon.*, 315; 4 *B. Mon.*, 388; 11 *B. Mon.*, 195; 3 *J. J. Mar.*, 155; 1 *B. Mon.*, 214; *Civil Code*, sec. 372; 1 *Bibb*, 142.

SIMPSON & SCOTT, on same side, cited *Graham and Waterman on New Trials*, vol. 2, pages 417, 440-1-2, 458, 461-2, 466-7-8, 470-1, 474-5, 534 to 543, 426-7-8-9, 430, 432-3; *Hardin*, 317, 586; 1 *Bibb*, 166, 248; 2 *Mon. and Harlan's Digest*, 220, secs. 36, 40, 41, 43; 5 *U. S. Digest*, 440-2-3; 1 *Bibb*, 165-6; 4 *Ib.*, 515; 3 *Dana*, 258; *Civil Code* sec. 158, note 1, 156, 157; 1 *Dana*, 529; 5 *Mon.*, 560; 7 *Ib.*, 315; 3 *Dana*, 141; 5 *Dana*, 315, 323; 3 *Litt.*, 389; 2 *Bibb*, 442; 3 *Ib.*, 502; 2 *J. J. Mar.*, 37; 2 *Mar.*, 364; *Litt. Sel. Cases*, 179; 3 *Mon.*, 45, 236; 4 *Ib.*, 538; 1 *J. J. Mar.*, 491; 5 *Dana*, 263; 2 *B. Mon.*, 277; 2 *Mar.*, 520, 546; 3 *J. J. Mar.*, 61; 4 *Ib.*, 399; 4 *B. Mon.*, 389; 6 *Ib.*, 379; 1 *Bibb*, 304; *Starkie on Slander*, 68, 78, 83, 413 and note 414, 416; *Sedgwick on Measure of Damages*, pages 101, 102, 103; 2 *Mar.*, 130; 4 *Dana*, 122; *Printed Decisions*, 309; 1 *Bibb*, 249; 4 *Ib.*, 272; 1 *Mar.*, 431; 2 *Bibb*, 259; 4 *Litt.*, 118; 4 *Bibb*, 92; 8 *Dana*, 320; 2 *Mar.*, 365; 1 *Mar.*, 346; 3 *J. J. Mar.*, 61; 1 *Litt.*, 14; 4 *Litt.*, 117; *Litt. Sel. Cases*, 263; 3 *Mon.*, 60; 1 *Mon.*, 196, 1 *Mar.*, 335; 1 *Dana*, 529; 1 *B. Mon.*, 214.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

This was an action for slander in the name of Margaret Moran, by her father and next friend, against Milton Taylor, the original petition alleging that the defendant had charged the plaintiff, in various forms of expression, with being a whore.

In an amended petition it was alleged that the defendant had, *since the commencement of the action*, slandered the plaintiff

by saying that she was a whore and he could prove it. The defendant answered, denying the speaking of any of the defamatory words charged.

On the trial the plaintiff attempted to prove the speaking, by the defendant, of the slanderous words charged in the original petition, and did prove, without objection, the speaking by him, after the action had been brought, the words charged in the amended petition.

There was a verdict in favor of the plaintiff for six thousand dollars. The motion of the defendant for a new trial having been overruled, and a judgment rendered in conformity with the verdict, he has appealed to this court.

The court below, on the trial, gave to the jury the following, among other instructions: "If the jury believe from the testimony that the defendant, Milton Taylor, spoke of and concerning the plaintiff, Margaret Moran, (suing by her next friend,) the words in the petition, or amended petition, charged, at or before the filing thereof, or words of similar import, they must find for the plaintiff, and may, in their discretion, find exemplary damages not exceeding the amount claimed in the said petition. And, in determining the amount of damages, they will consider all the facts and circumstances proven in the cause." Other instructions were given, at the instance of the plaintiff, all proceeding upon the assumption that the plaintiff had a right to recover, as well for slanderous words spoken by the defendant *after* the action had been brought, as for words spoken previously.

1. As the slanderous words which may have been spoken after the commencement of the action, constituted, of themselves, a distinct and independent cause of action, it is perfectly clear, upon well settled principles, that they could not be relied upon in this case, either as a distinct ground of recovery, or to enhance the damages to which the plaintiff might be entitled on the original cause of action, unless, as has been argued, the Code of Practice has introduced such a change in the system of procedure formerly in force as will allow this to be done.

In support of the view contended for, we are referred to *sections 111 to 114, inclusive, and sections 159 to 162, inclusive; also to the case of Brookover vs. Hurst, (1 Met. Ky. Rep., 665.)*

The first four of these sections relate to the joinder of actions, and have no application to cases like the present. They refer, evidently, to causes of action existing at the time of the commencement of the suit, and not to such as arise subsequently.

The other sections relied on relate to amendments. But the amendments which they allow must be such as relate to the case actually in court, and not such as constitute an entirely new and distinct case. The language of *section 162* is, that "the plaintiff and defendant respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts *material to the case*, occurring after the filing of the former petition, answer, or reply." The facts then which this provision allows to be presented in the supplemental complaint, must be material to the case as presented in the original complaint. They must be such as serve to explain or to perfect the cause of action originally stated. Would it be contended that in an action of assault and battery, an assault committed after the commencement of the suit could be set up in a supplemental petition as an additional ground of recovery, under the section referred to?

The case of *Brookover vs. Hurst* is wholly unlike the present case. There the facts, which occurred after the commencement of the suit, were not only material to the case, but were such as rendered complete and perfect the original cause of action, and entitled the plaintiff to recover on it. Here the subsequently occurring facts form a separate ground of action, having no connection with the original cause of action, and not necessary to enable the plaintiff to recover on it. The facts were not "material to the case" which was pending when they occurred, and did not serve either to perfect or explain it. It follows that the court erred in directing the jury to find for the plaintiff, if they believed the defendant spoke the words in the petition or amended petition charged, and that, in determining

the amount of damages, they were to consider all the facts and circumstances proven in the cause.

It appears, however, from the bill of exceptions, that after the argument to the jury had closed, the judge expressed doubts as to the correctness of the instruction we have been noticing, and thereupon, of his own motion, gave the jury the following additional and explanatory instruction: "The plaintiff cannot recover in this action for any words not uttered before the original petition was filed. But the evidence before the jury, as to words uttered by the defendant since the filing of the original petition, is competent to be considered by the jury as bearing upon the question of malice, or the spirit and disposition with which he uttered the words complained of in the original petition, if they believe, from the evidence, such words, or words of similar import, were uttered; but the jury cannot regard such words, uttered since the filing of the original petition, as substantive slanders for which they may give damages in this action. And this instruction is to be regarded by the jury as a modification or alteration of those heretofore given. And unless the jury believe, from the evidence in the cause, that the defendant, before the filing of the original petition, spoke of and concerning the plaintiff the words charged therein, or words of similar import, the plaintiff cannot recover in this action."

The question now arises, was the error which the court had previously committed, in presenting the law of the case to the jury, cured by this last instruction? As preliminary to the proper solution of this question, it becomes important to ascertain, with as much precision as possible, for what purpose, and to what extent, in an action of this kind, the plaintiff is allowed to prove the speaking, by the defendant, pending the action, of words similar to those charged in the petition.

Upon this point the authorities leave no room for doubt or uncertainty.

In the case of *Campbell vs. Thompson*, (*Mass. opin. winter term, 1854*.) this court, after stating some of the objections to the admissibility of such evidence for any purpose, said, that "notwithstanding these objections, the authorities on the question

Taylor vs. Moran.

of the admissibility of such evidence, in the action of slander, though somewhat contradictory, seem to favor its admission. In the case of *Bodville vs. Swan et ux*, (3 *Pickering*, 378.) Ch. J. Parsons states the cases on the subject, and adopts the conclusion that when the words spoken after suit brought are of similar import with those charged in the declaration, they are admissible evidence. But if the same words, spoken after suit brought, are admitted in evidence without such qualification as would inform the jury as to their legitimate effect, they might well be regarded by the jury as evidence of whatever they may tend to prove, and they might consider it not only in their determination of the question of malice, but also in determining whether the words charged had been spoken, and the whole verdict might be founded upon it." The opinion then proceeds to state that all the considerations which had been adverted to, conspire to show that, if such evidence be admitted, it should, and especially when objected to, be accompanied with such cautionary directions, on the part of the judge, as may, as far as practicable, restrict its effect upon the verdict within the legitimate purpose of its admission—and that is, simply and merely to show the *intent* with which the slanderous words charged were spoken.

In the more recent case of *Letton vs. Young*, (2 *Mct. Ky. Rep.*, 558,) it was held that a letter written pending the action, and containing words similar in substance to those charged in the petition, was admissible for the purpose of showing malice, but for no other purpose; and the question arose whether it was not the duty of the court, at the time of its admission, to caution the jury as to its effect, so that it might not receive undue weight in the assessment of the damages. And it was decided that, although an instruction had been given to the effect that the letter in question was only admissible to show malice, and for no other purpose, yet, as the instruction "is silent upon the subject of damages, and fails to caution the jury, in terms, not to increase the damages on account of the letter, the caution contained in the instruction, if it can be called a caution on that subject, could have been of no practical benefit to appellants in the matter of damages, for

in another instruction, given at appellee's instance, and the only one relating to the question of damages, the jury are told in so many words, that they had the right to award such damages to the plaintiffs as they thought them entitled to, *from all the facts and circumstances proved in the case*, without any allusion being made therein to the letter, or the effect to which it was entitled in the assessment of damages." (*Starkie on Slander*, page 308; 2 *Greenleaf on Ev.*, secs. 271, 418.)

The same rule must be applied to the present case, for it is obvious that the two cases are strictly analogous. Here the evidence in question had been admitted without any admonition to the jury as to the weight or effect they were to give to it. They had been instructed that in determining the amount of damages the plaintiff had a right to recover, they were to consider *all the facts and circumstances proven in the cause*, thus giving to the evidence of the repetition of the slander, by the defendant, pending the action, the same value and effect upon the question of damages, as any or all the other evidence before the jury. The case as thus presented by the pleadings, proofs, and instructions, was submitted to the jury, and argued by counsel. Up to this point a radical error, highly prejudicial to the rights of the defendant, had characterized the entire case, leaving, as must be presumed, its appropriate impression upon the minds of the jury. How was that error to be cured, and that impression removed? Clearly in no other way than by a full and explicit statement to the jury of the purpose for which alone the evidence of the subsequent speaking of the slanderous words was admissible, embracing distinctly and specifically the idea that such evidence could not be considered, by them, to increase the damages which they might award against the defendant for the speaking of the actionable words charged in the original petition. This was not done, although attempted by the court, in the instruction already quoted, given after the close of the argument. In that instruction the jury were told, it is true, that the evidence was admissible on the question of malice, and that they could not regard the words, uttered since the filing of the original petition, as *substantive slanders*, for which they might give damages

in this action. But this language does not fairly imply, nor could the jury have probably understood from it that they were not allowed to consider the speaking of these words at all on the question of damages, or that they might not give these words the weight and effect to which they might think them entitled, in making up their estimate of the damages for the slanderous words charged in the original petition, especially as they had been distinctly told, at a previous stage of the trial, that they were to consider *all* the facts and circumstances proven in the cause, in determining the amount of damages. The injurious influence of a similar instruction was held in *Letton vs. Young, supra*, not sufficiently obviated by an admonition to the jury that evidence of the repetition of the slanderous words was admissible to show malice, and for no other purpose, because the instruction containing this admonition, was silent on the subject of damages, and failed to caution the jury, in terms, not to increase the damages on account of such repetition. The same conclusion must be adopted here.

2. To a proper understanding of the second ground relied on for reversal, a brief statement of some of the evidence will be necessary.

It appears that the wife of the appellant (or a woman claiming to be his wife) had sued him in the Mason circuit court for a divorce. One of his grounds of defense was that she was unchaste. On the 18th of March, 1858, the parties with their counsel met at the office of F. T. Hord, Esq., in Maysville, for the purpose of taking the deposition of Rudy to be read as evidence in that suit on behalf of the appellant. In the course of the examination, the witness was asked by Taylor's counsel, if he had not seen Mrs. Taylor in company with "Peg Moran" (referring to the appellee) on the streets and at the theatre. The question was answered in the affirmative. Mrs. Taylor's counsel then asked the witness if respectable ladies in Maysville, mentioning the names of several, did not visit the theatre. This question was also answered in the affirmative. Thereupon Taylor's counsel said, with some indignation, that if one of the ladies named did go to the theater,

she did not go there with whores. Considerable excitement ensued. The same counsel then propounded in writing the following interrogatory: "Do you not know that Peggy Moran's father has discarded her, and driven her from his house on account of her dissolute, bad conduct?" Mrs. Taylor's counsel immediately rose up and said, it was false—that her father had never driven her from home. Taylor, the appellant, rose from his chair, and in reply to this remark, said, "*he did, he did.*" The conversation was attended with considerable excitement.

But two witnesses testified to what occurred on this occasion—F. T. Hord and Rudy. They concur substantially in their detail of the facts. Hord stated that he was satisfied that the word "whore" was used by Taylor's counsel and by no other person.

On the day following this occurrence the original petition in the present case was filed, charging the appellant with having said of the appellee, 1st. "The plaintiff is a whore;" 2. "The plaintiff is a strumpet and a rip;" 3. "The plaintiff is a dirty bitch;" 4. "Catharine associates with Peg Moran, that strumpet who is not fitten for any body to associate with."

The only other evidence in support of these allegations, is the testimony of two female witnesses who detail a conversation they had with the appellant a short time after the action had been brought. They state in substance that in that conversation the appellant was asked "what Peggy Moran had sued him for," and that his reply was that "he had called her a whore, and she had sued him for it." In their depositions which had been taken some months before the trial, these witnesses in referring to the same conversation, stated on cross examination that the appellant's answer to the question was: "She sued me for calling her a whore." They also state that in that conversation the appellant used other language defamatory of the character of the appellee.

Upon the case as thus presented by the evidence, the question arises whether the court did not err in giving the several instructions which authorized the jury to find for the plaintiff if they believed from the evidence that the defendant, before

the commencement of the action, spoke of the plaintiff the words charged in the original petition, *or words of similar import*; and especially in giving the fourth instruction asked by the plaintiff, in which the jury were told that if, before the filing of the petition, the defendant spoke of the plaintiff "*any* words making or importing the charge of unchastity contained in the petition, she could recover in the action."

It has not been denied in argument, and indeed cannot be doubted that the effect of these instructions was to submit to the jury the question whether the words "he did, he did," spoken by Taylor in Hord's office, imported "the charge of unchastity contained in the petition," and whether those words, spoken, as they were, in reply to what had just before been said by the counsel, were words of *similar import* to those charged in the petition; and if the jury so believed, to find for the plaintiff.

For the appellee it is contended that the old rule which required the plaintiff, in an action of slander, to prove the words precisely as laid, is now obsolete, and that it is sufficient to prove the substance of the words.

This is undoubtedly the doctrine recognized and acted upon by this court in the various cases cited in argument. But when the cases are examined it will be found that they fall very far short of sanctioning the principle on which the instructions before us are supposed to rest.

In *Hume vs. Arrasmith*, 1 *Bibb*, 165, the words charged were, "John Hume (the plaintiff) stole corn and I can prove it," &c. The proof was that the defendant had said of the plaintiff "he had stolen corn and he (defendant) could prove it." It was held that the variance between the allegation and proof was immaterial, and the objection, on that ground too technical, and could only be sustained under the old and exploded notion that the plaintiff must prove the words precisely as laid, and that this had been supplanted by the more rational doctrine that if the plaintiff proves the *substance* of the charge laid in the declaration it is sufficient.

In *Huffman vs. Shumate*, 4 *Bibb*, 515, the words laid in the declaration were in the *third* person, as that "he, (meaning

the plaintiff,) stole" &c., and the words proved were in the second person, as that "you (meaning the plaintiff) stole" &c. It was held that the substance of the charge was the imputation of theft, and whether conveyed in the second or third person, the crime was equally imputed and the allusion sufficiently certain; that the old doctrine requiring proof of the words precisely as laid was exploded and that proof of the *substance* of the words was sufficient.

In *Daily vs. Gaines*, 1 *Dana*, 529, the only question was whether words charged to have been spoken in the *second* person were sufficiently proved by evidence of words spoken in the third person, and it was decided that they were.

To the same effect are the other cases relied on. (5 *Mon.* 580, 7 *Mon.* 315.)

In none of these cases was there any material variance between the *words* charged and the *words* proved. In none of them was there an attempt made to sustain the action by proof of *equivalent* words or words, of the same effect or import.

The well settled rule of pleading in actions of this sort is, that the specific words in which the slander is conveyed, must be set forth in the petition; and that it is not sufficient to state merely the *effect* of the words uttered, or that the defendant charged the plaintiff with the commission of a particular crime.

In *Ward vs. Clark*, (2 *Johnson's Rep.* 9,) the second count in the declaration was for "falsely and maliciously charging and imposing on the plaintiff below the crime of perjury." The count was held defective because "it is not alleged what particular words were spoken; nor does the plaintiff pretend to set forth the substance of the expressions of which he complains. No precedent, ancient or modern, warrants this form of pleading. The plaintiff contents himself with drawing his own inference from the declaration made, and alleges such inference without apprising the defendant of the words, or *substance* of the words spoken. The rule of evidence in actions of slander formerly was, that the plaintiff must prove the precise words; and that rule has been no further relaxed than to

admit proof of the substance of the words." (12 *Serg. & Raule*, 428.)

What the courts mean by the use of this phrase—"the substance of the words"—is indicated by the cases already cited, and is still more clearly shown in other judicial decisions of the highest authority. In *Olmsted vs. Miller*, (1 *Wendell*, 506,) the words charged were that the plaintiff had had sexual intercourse with three different persons whose names are stated. The proof was that the defendant had said of the plaintiff that the plaintiff was a thief; that she was fond of men; that she was a very bad woman; that the three persons named in the declaration were in the habit of visiting frequently at her house, &c. It was held that "these words, although they may be said to be equivalent to the charge of having connection with P. B., yet, within the rule heretofore established, they are not the same in substance. The same remark is applicable to the other charges. The same idea is conveyed in the words charged and those proved; but they are not substantially the same words, though they contain substantially the same charge but in different phraseology."

In *Wormouth &c. vs. Cramer &c.*, (3 *Wendell*, 394,) the slanderous words were set forth in the *English* language. They were proved to have been spoken in the *German* language, which was understood by the persons hearing the speaking. The court said: "The rule is that words proved must be proved as laid; that is, substantially so; and it is not enough to prove words of *similar import*. How can this rule be complied with when words are laid in one language and proved in another? This is emphatically proving words of similar import."

On the authority of these and a number of other adjudged cases the rule in regard to the proof of words in actions of slander is thus stated in the *American Leading Cases*: "The rule is that the words must be proved substantially as they are laid; it is not enough to prove words of the same effect or import, or conveying the same idea; the words must be substantially the same words, and it is not sufficient that they contain substantially the same charge, but in different phraseology;

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equivalent words of slander will not do." (1 *Am. Lead. Cases*, 164.)

And while the proof of speaking is for the jury, the correspondence between the words spoken and laid, is for the court. (3 *Wharton*, 138.)

The main object of requiring the specific words constituting the slander to be stated in the petition is that the defendant may know what he has to meet, and may have an opportunity of alleging and proving matter of explanation, or defense; as that they were spoken with reference to a different subject or person, or in a different sense than that in which the plaintiff thinks proper to apply them. But this object would be wholly defeated by allowing proof of words widely varying from those alleged, but which the jury might consider were words of similar import to those charged; this would be in effect to submit to the jury the legal question, what are, or are not actionable words.

It is unnecessary, in view of what has been said, to notice more in detail the several objections to the rulings of the court below in giving and refusing instructions.

For the errors mentioned the judgment is reversed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

CASE 20—PETITION EQUITY—JANUARY 23.

Hurd, &c. vs. Courtenay, &c.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

1. In the absence of an averment that a conveyance was made in another State, and of proof of what the law of such State is on the subject, the validity of the deed must be tested by the laws of this State. (3 *A. K. Mar.*, 174.)

2. Where the husband reduces to possession, without resort to a court of equity, an interest in an estate descended to the wife, consisting of cash, he acquires a complete legal right to it, and the wife has no equity to a settlement against his creditors seeking to subject property (a slave,) purchased by the husband, and conveyed to a trustee for her benefit; even if he was induced to make the conveyance because he had received money which his wife derived by inheritance. It must be considered as a voluntary conveyance.

3. A conveyance, though voluntary, is not on that account alone void as to subsequent creditors.

4. See the opinion for a statement of facts, such as the condition of the husband's pecuniary affairs, &c., upon which it is held that a voluntary conveyance of a slave by a husband to a trustee, for the use and benefit of his wife, was fraudulent, and avoided the deed as to a subsequent creditor.

5. Under the statute to protect creditors against fraudulent and voluntary conveyances, a liberal construction, in allowing to persons who are, or might be, injured by such a conveyance, the character of creditors, ought to prevail. *Argu.* (1 *American Leading Cases*, 73.)

6. *Quere.* Is the liability of a sheriff to the plaintiff in an execution, from the time it is placed in his hands, such an indebtedness as to give to the sheriff the character of a debtor within the meaning of the statute, *supra*?

SPEED & BARRET, for appellants, cited *Rev. Stat.*, chap. 40, secs. 1 and 2.

PIETLE & ROBERTS, for appellees, cited *Rev. Stat.*, chap. 40, secs. 1 and 2; *Story's Equity*, chap. 7; 3 *Johns. ch. R.*, 500.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

In April, 1860, the appellant, Hurd, recovered a judgment in the court of common pleas for the county of St. Louis, State of Missouri, against Kennett McKenzie, for the sum of \$912 28, upon which he caused an execution to issue in said month of April, 1860, and placed it in the hands of appellee, Thomas E. Courtenay, who was then the acting sheriff of said county, duly commissioned and qualified. Said execution was returnable to the November term, 1860, of said court.

Before or about the 1st of August, 1860, Courtenay collected the money upon said execution, and returned it satisfied; but failed to pay the same, or any part thereof, to the plaintiff, who then brought his motion in said court against said Courtenay, and a part of his sureties in his official bond, and, on the 19th of January, 1861, recovered a judgment against them for the sum of \$932.76, with interest after the rate of 10 *per centum per annum*, from the 19th of November, 1860, till paid.

After the recovery of the last named judgment, this suit was brought in the Louisville chancery court to subject a negro girl, in possession of the wife of said Courtenay, to the payment of it.

It is alleged in the petition that the negro girl was purchased by said Courtenay during the summer of 1860; that he had the title to her made to his brother-in-law, William Clendenen, for the use and benefit of his wife; that Courtenay, at the time, was embarrassed, and owed, and was liable for, greatly more than he was worth, and that the title to said girl was conveyed in trust for his wife in fraud of the rights of his creditors.

The defendants filed separate answers, and Mrs. Courtenay, in her answer, denies the insolvency of her husband at the time he made the conveyance of the slave in trust for her benefit, and says he was then unembarrassed and in easy circumstances as to pecuniary matters. She alleges that the girl was purchased with *her* money, derived "from the estate of deceased relatives," that she was not provided for by any settlement, or otherwise; and, if her husband had sought to take this money to himself, she is advised that a court of equity would not have permitted him to do so; denies that said conveyance was fraudulent in any sense whatever, insists that it was fairly, properly, and equitably done, and asks that the attachment be discharged.

T. E. Courtenay, in his answer, denies that at the time he purchased said slave, and conveyed her in trust for the benefit of his wife, he was insolvent, or embarrassed with debts, but says he was then in easy circumstances as to pecuniary matters.

He also says the money with which the girl was paid for was his wife's, derived by descent from her deceased relatives, and that the settlement was made because she had not been previously provided for in any other way; denies the conveyance was made in fraud of the rights of his creditors in any sense, and resists the claim of appellants to subject the slave to the payment of their debt; he does not, however, deny his insolvency at the time his answer was filed, but substantially admits it.

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Clendenen, the trustee, denies any knowledge of any fraud in the transaction, denies that there was any on his part, and asks for a discharge of the attachment.

There is some proof tending to show that the deed was executed in Missouri, but it is not averred in any of the pleadings that it was executed in that State, and it seems to be conceded in argument that the rights of the parties involved in this controversy, growing out of the deed, must be governed by the laws of Kentucky.

There being no averment in any of the pleadings that the conveyance was made in Missouri, and no proof offered of what the law of that State is on the subject, we are of opinion that the validity of the deed must be tested by the laws of this State. (*Surlott vs. Pratt*, 3 A. K. Mar., 174.)

One of the grounds relied upon to defeat appellants is, that the girl was paid for with the money of Mrs. Courtenay, which she had inherited, and, as no settlement had been made upon her out of the money thus inherited, a court of equity would, upon her application, have done what has been done, and therefore the deed should be sustained.

According to the proof, Mrs. M. A. Clendenen died in the city of St. Louis, intestate, and without children, in the summer of 1854, or 1855, possessed of a small personal estate and some slaves. She seems to have left no brother or sister surviving her, and J. Speed Peay proves that upon her death her estate passed to the children of her sister, Mrs. Eliza Clendenen, dec'd., six in number, and of whom Mrs. M. A. Courtenay was one, and to the children of her brother, Austen L. Peay, dec'd., three in number, of whom the witness was one. He proves that his brother, George N. Peay, and himself, conveyed their interests in their said aunt's estate to their cousins, Mrs. Courtenay, Ellen Clendenen, now Mrs. Walker, Eliza Julia Clendenen, afterwards Mrs. Butler, and perhaps to John P. Clendenen; he did not know whether his sister joined in said conveyance or not.

The slaves were sold, and the whole estate converted into cash. When this was done, however, does not appear. The appellee, Thomas E. Courtenay, was the administrator, and,

from an account taken, or settlement made by him with the probate court, a copy of which is filed, there was, at the June term, 1860, of said court, in his hands the sum of \$4,330.43, which, from the proof, we assume was the whole amount of the estate after deducting the cost of administration.

The interest of Mrs. M. A. Courtenay in the estate consisted of cash, and it had been reduced to possession by her husband, who thereby had acquired a complete legal right to it. He did not resort to a court of equity for the purpose of obtaining the possession of the property, or of converting it into cash, nor had such court any control over the matter whatever. Consequently the wife had no equity which could be enforced, and the conveyance can derive no support on that ground. (*Bowling and Boucher vs. Winslow's adm'r.*, 5 B. Mon. 29; 1 *Eq. Leud. Cases*, 351.)

Even if Courtenay was induced to make the conveyance because he had received the money of his wife, derived from the estate of her aunt, that circumstance is not sufficient in point of law to show that the consideration moved from her; but it must be considered as a voluntary conveyance, and if sustained it will be upon other grounds.

The deed is not filed, nor is its precise date shown by the proof. But, let it be assumed that it was executed before Courtenay had in fact collected the money on appellant Hurd's execution, and that he and his assignee are, therefore, to be regarded as subsequent creditors; then, as to them, the conveyance, though voluntary, is not, on that account alone, void under our statute. (*Sec. 2, chap. 40, vol. 1 Rev. Stat.*, 546.)

It then becomes necessary to go into an investigation of the facts, to ascertain whether the transaction is vitiated by fraud.

Thomas M. Barrow proves that he was deputy under Courtenay while he was sheriff of St. Louis county; that Courtenay was appointed in January, 1860, and ceased to act about the 1st of August of the same year. He also proved that he was the deputy of Cassil, the predecessor of Courtenay; and, as deputy sheriff, he had returned executions against Courtenay just before his appointment, on the 12th of January, 1860, with the endorsements of "nulla bona." One of them was for

\$2,500, another for \$1,100, besides others for amounts not remembered.

He furthermore proved, that he knew, from an examination of his sheriff's books, that Mr. Courtenay owed, in November, 1860, money collected on executions, and other processes, to the amount of about thirty-five thousand dollars, much of which was collected prior to July, 1860, and in that month he had a large amount of money in his hands, collected as sheriff; and, from an examination of his books, he believed that Courtenay was a defaulter for thirty or thirty-five thousand dollars.

Whitelsey proves that he had known Courtenay for many years; he was without much property, if any, and he believed him to be insolvent at the time he received the appointment of sheriff. That the sureties in his official bond had paid, and secured to be paid, over twenty-five thousand dollars, which amount had been collected by Courtenay on executions, whilst he was sheriff, and the greater part thereof he had collected prior to the first of July, 1860. He also proved that Courtenay's defalcation would, in his opinion, amount to \$30,000 or \$35,000; that he derived his knowledge of Courtenay's defalcation from being counsel for his sureties, and acting for them in settling these claims, and from the statements of Courtenay in a conversation with two of his sureties, when he admitted he had defaulted and had then placed in their hands all the property that he had to transfer to them, to indemnify them, and the whole of it would not amount to three thousand dollars.

On the other hand, a number of deeds are filed, by which divers tracts and parcels of land are conveyed to Courtenay; and two witnesses are introduced to prove his pecuniary condition at the time the settlement was made, one of whom says he was solvent, his credit was good, and he owned lands of the value of twenty thousand dollars. He also proves that his wife's money, derived from the estate of her aunt, paid for the slave Margaret; but this witness was not present when the girl was purchased, did not see the money paid for her, and does not know to whom it was paid. He does not know

whether Courtenay has settled his liability as sheriff, or that his sureties had paid any of his liabilities, and gives no account of what was done with the lands of which he speaks. The other witness knew but little about the condition of Courtenay, but *supposed* he was solvent.

The fact that Mr. Courtenay was indebted to a large amount is proved. In less than one month after the conveyance was made, if it was made at or near the time he purchased the slave, he is overwhelmed in debt; and, in three months thereafter, as a public officer, it is ascertained that he had collected debts of other persons, on process in his hands, to the amount of thirty thousand dollars, and, perhaps, thirty-five thousand, a large part of which his sureties in his official bond have settled, and are liable for the balance, and the means which he exhibits to indemnify them, the witness thinks, will not amount to three thousand dollars, paying not more than one dollar in the hundred. There is no proof that he was engaged during the time in any other business than that of sheriff, or that he embarked in large speculations which proved disastrous, and in which the money might have been lost.

Much the larger portion of the estate of Mrs. Clendenen consisted of slaves; to a part of which his wife was entitled. If it had been desirable that she should have a slave secured to her separate use, why she did not prefer one of those, being six in number, who had belonged to her aunt, and with whom she must be presumed to have been acquainted, to one about whom she knew nothing, or if she did it is not shown, is not accounted for.

The short period which intervened between the execution of the deed and the disclosure of the ruined condition of Mr. Courtenay's pecuniary affairs; the magnitude of his indebtedness compared with his means of payment; and the rapidity with which this vast debt was created, without any explanation how, or for what, it was created, together with the fact that the conveyance was executed so near the time that the money was collected on appellant's execution, which has not been accounted for, and no witness can tell how it was applied, we think conclusively establish a fraud.

In the case of *Sexton vs. Wheaton* the conveyance was upheld, because at the time of its execution it did not appear that the husband was indebted; he had then no intention of entering into commerce; his failure did not occur until two years or more after its execution; and there was no connection between the debts and the deed—the learned judge remarking, in that case, that they were as distinct as if they had been a century apart. (*Sexton vs. Wheaton*, 1 vol. *Amer. Lead. Cases*, 54.) The facts enumerated in that case, and upon which the deed was upheld, are very different from those in this case.

The statute, 13 *Elizabeth*, chap. 5, was made to protect creditors and *others*, and a liberal construction in allowing to persons, who are or might be injured by a fraudulent conveyance, the character of creditors under this statute, has always prevailed. Hence it is said: As to rights from contract, any one liable upon a contract, express or implied, though only contingently, is a debtor from the time that the liability is entered into; accordingly a surety is a creditor of the obligor, or co-surety, from the time the obligation is entered into. (*Note to Amer. Lead. Cases*, 1 vol. page 73, and authorities cited.)

It is true that our statute is not in the language of the statute of *Elizabeth supra*, yet the construction given to that statute by the courts generally was, that a voluntary conveyance was not, as to subsequent creditors, void; but, to render it so, the transaction must have been fraudulent. Hence judicial expositions of that statute may be very properly resorted to as important aids to a correct exposition of ours.

We do not, however, now decide that Mr. Courtenay was in fact a debtor to the plaintiffs from the time the execution was placed in his hands. We do not deem it necessary in this case.

But we are of opinion that the facts herein enumerated, with other circumstances which are shown to have attended the transaction, are such as to establish a fraud, and should avoid the deed.

Wherefore the judgment is *reversed*, and the cause remanded for further proceedings, consistent with this opinion.

CASE 21—PETITION ORDINARY—JANUARY 26.

Steadman vs. Guthrie, et al.

APPEAL FROM THE JEFFERSON CIRCUIT COURT.

1. In an action by one of the depositors of a banker against the defendants, upon an alleged agreement by them to guaranty the depositors of such banker in the payment in full of their demands against him on account of money deposited with him—the plaintiff alone being entitled to the money claimed by him—the other depositors, having no interest in it nor in the action, are not necessary parties.

2. Even if the acceptance of the guaranty by the other depositors was necessary to render it obligatory in favor of the plaintiff, that fact did not make them necessary parties to the action.

3. A writing imports *prima facie* a valuable consideration; but the presumption of a sufficient consideration ceases to exist whenever the party relying upon the agreement undertakes, though unnecessarily, to show what was the consideration. (7 *John.* 321; 1 *A. K. Mar.*, 331.)

4. Future forbearance by the depositors of a banker can form no consideration for an absolute agreement by guarantors to pay the depositors without reference to such forbearance.

5. Contracts, required by the statute of frauds to be in writing, stand upon the same footing as other written contracts with respect to the consideration, which need not be expressed in the writing, but may be proved, when necessary, or disproved, by parol or other evidence; and this whether the consideration be executed or executory.

6. In an action upon a writing, purporting on its face to be an unconditional guaranty, but which does not express the consideration upon which it is executed, the averments of the petition as to the consideration show that the contract was conditional, depending for its validity upon the performance of certain acts by the promisees. *Held*, That there is no variance between the contract contained in the writing and that set forth in the petition.

7. A conditional promise for the payment of money becomes absolute as soon as the condition is fulfilled, and may be declared on as if it had never existed. For as the engagement of the promisor finally results in such cases in an unqualified obligation, the law implies an unqualified promise for its fulfillment. (1 *Smith's Leading Cases*, 628.)

8. A writing was as follows: "We the undersigned agree to guaranty the depositors of W. E. C., in the payment in full of their demands against said C., on account of money deposited with him. We have entire confidence in his ability to meet all demands." In an action against the guarantors, the petition alleged that public confidence in C. was impaired, and that it was executed in consideration that the plaintiff and the other depositors would forbear to withdraw their deposits, and would permit C. to keep and use the same during the panic, or until he could conveniently pay them, and to prevent "a run upon him" and of sustaining his credit. *Held*, That the plaintiff is not estopped from relying upon the alleged consideration, which is not in-

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consistent with the writing. The writing neither estops the plaintiff nor the defendants from showing the consideration upon which it was founded.

9. In such case, the petition should allege forbearance by all the depositors. Where, however, it is averred that the guarantors designed the paper as a guaranty to such of the depositors as might give the forbearance to C., and that they executed it in consideration of such forbearance to be given by the several depositors; in a suit by one, it is not necessary to allege forbearance by all.

10. If the alleged guaranty was given in consideration that the several depositors would forbear to demand their deposits, the giving of forbearance would be sufficient. An agreement to give it, without doing so, would not.

11. If the consideration was forbearance to C. during the panic, or until he could conveniently pay, his failure, and the close of his house a few days after the execution of the guaranty, dispensed with the necessity of further forbearance; and forbearance until that time formed a sufficient consideration to support the contract.

12. It is a general rule that if a person offers to pay money upon the performance of an act by another, the performance of the act by the latter, without any notice of his acceptance of the offer, or of his intention to act upon it, gives him a right to demand the money. But it is settled as an exception to that rule, that where the offer is to guaranty a debt for which another is primarily liable, in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor; but the creditor must notify the guarantor of his acceptance of the offer, or of his intention to act upon it. (2 *Amer. Lead. Cases*, pages 35 to 107; 7 *B. Mon.*, 5; 13 *Id.*, 381; 14 *Id.*, 184; 7 *Pet.* 113.)

13. That the guarantors might, by inquiry from the person in whose favor the guaranty was given, have learned what had passed between the guarantors and himself, will not dispense with notice. A person thus proposing to become surety for another is not bound to inquire as to the acceptance of his proposal—the creditor, who intends to hold him responsible for the debt of another, must show that he had reasonable notice of such intention.

14. The doctrine *supra* is not opposed by the decision in *Lent vs. Padelford*, (10 *Mass.* 230,) nor that in *Kasey vs. Lane*, (1 *Met. Ky. Rep.*, 410.)

15. When notice of the acceptance of an offer to guaranty is requisite, (in an action on such guaranty,) the allegation of notice in the petition should be special, and such as will enable the court to determine from its statements whether or not the notice was given as the law requires. (2 *Ala.* 373; 3 *Conn.* 438.) The general averment, “of all which the defendant had notice,” is not sufficient.

16. Allegation of a legal conclusion, deduced by the plaintiff from facts alleged in his pleadings, is not a material allegation.

17. Plaintiff alleged in his petition, in substance, that public confidence in C., a banker, being greatly impaired, in consideration that the plaintiff and the other depositors would forbear to withdraw their deposits, and would permit C. to keep and use the same during the panic or until he could conveniently pay them, and to prevent a run upon him, and of sustaining his credit, the defendants signed and delivered to C., (the banker,) and published in the newspapers, the following instrument:

“Louisville, Oct. 1, 1857. We the undersigned agree to guaranty the depositors of W. E. C. in the payment in full of their demands against said C., on account of money deposited with him. We have entire confidence in his ability to meet all demands.” That the paper was shown to plaintiff by C., and that accepting and relying upon the same, he, upon the faith of the guaranty, forbore to withdraw his money as he purposed to do, of all which defendants had due notice; and that C.

failed and closed his banking house on the 5th of October, 1857. *Held*, (upon demurrer to the petition,) That the petition is fatally defective for want of special averment of reasonable notice to the guarantors of the plaintiff's acceptance of the offer, or of his intention to act upon it.

W. C. WOOD, for appellant, cited 4 *Bibb*, 454; 7 *Blackford*, 526; *Bouvier, Inst.*, 2 vol., 56; 11 *Shep.*, 73; *Pike*, 76; 20 *Wendell*, 82; 14 *B. Mon.*, 185; *Holbart*, 31; *Cro. and Jac.*, 287, 432, 685; 7 *Cranch*, 523; 14 *Conn.* 490; 5 *Tenn.*, 596, 606; 4 *Dog.*, 444; 24 *Wend.*, 35; 3 *Sneed, Tenn.*, 89; *Brown*, 390; 5 *Mason & Welby*, 500; 7 *Cranch*, 69; 12 *East*, 10, 227; *Adol. & Ellis*, 309; *Kent*, 163; 12 *Wheat.*, 515; 1 *Ld. Raymond*, 357; 1 *Barn. & Adol.*, 603; 2 *Howard*, 426; 10 *Moore*, 395; *Parsons on Contracts*, 365, and notes; 15 *N. Hamp.*, 127; 9 *East*, 248; 1 *Barr*, 394; 1 *Smith's Leading Cases*, 6th *Amer. Ed.*, 373; 1 *Strange*, 592; 2 *Harris*, 469; 4 *Barr*, 305; 12 *Mass.*, 154; 7 *N. Hamp.*, 549; 1 *Strange*, 88; 9 *Barb.*, 202; 5 *Pick.*, 380; 14 *Com.*, 490; 5 *Conn.*, 596; 7 *lb.* 532; 2 *Sacket*, 457; 5 *Tenn.*, 606; 1 *Chitty's Plead.*, 320; 24 *Wend.*, 35.

DEMBITZ & BIJUR, on same side, cited 10 *Mass.*, 230; 2 *Amer. Lead. Cases*, 33; 2 *Chitty's Plead.*, 316, 318; 2 *Salk.*, 457; *Holbart*, 51; *Cro. Jac.*, 432; 2 *Hen. Black.*, 613; 2 *Smith's L. C.*, 21; 1 *Met. Ky.*, 410; 5 *B. Mon.*, 403.

O. F. STIERMAN, on same side, cited *Parsons on Contracts*, 367, 69, and notes; 1 *Ld. Raymond*, 357; 1 *Barnwell & Adol.*, 603; 10 *Moore*, 395; 3 *Bing*, 107; 2 *Howard*, 426; 12 *Wharton*, 515; 12 *East*, 227; *Broom*, page 311, 313, 321, 388, 390 and 91, and 99; 5th *Mason & Welby*, 501; *Kent's Com.*, 163-4 and 5; 2 *Campbell*, 413; 7 *Cranch*, 69; 10th *Adol. & Ellis*, 309; 5th *Pick.*, 380; 1 *Strange*, 88; 12 *Mass.*, 154; 7 *N. Hamp.*, 549; 9 *Barb.*, 202; 3 *Watts*, 213; 5 *Rawle*, 69; 4 *Barr*, 305; 5 *Harris*, 469; *Hobart*, 31; *Cro. Jac.*, 432; *Smith vs. Gaffe*, 2 *Ld. Raymond*; *Cro. Jac.*, 287; *Cro. Jac.*, 685; *Cro. Jac.*, 34; 14 *Conn. Rep.*, 479; 16 *Viner's Abridgement Title Notice*, page 5, pl 10; 5 *Tenn. Rep.*, 606; *Lawson's Pl.*, 221; 1 *Chitty, Pl.*, 320; 2 *Wm. Saunders*, 62, n.; *Comyn's Dig.* 575, title *pleading*, 2 *Salkeld*, 457; 5 *Conn. Rep.*, 596; 4th *Day*, 444; 7 *Conn. Rep.*, 523; 24 *Wendell*, 35; 2 *A. K. Marshall*, 255, 733; 1 *Burr*, 394; 1 *Strange*, 602; 1 *Denio*, 404; 15 *N. Hamp.*, 127; 10th *Exchequer*, 323; 9th *East*, 248; 1

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Smith's Leading Cases, 5th Amer. Ed., 373; 25 Ala. Rep., 704; 15 Conn. Rep., 457; 5 Peters, 624; *Adams vs. Johnson*, 12th Peters; *Douglas vs. Reynolds*; *Lee vs. Dick*; *Bright vs. McKnight*, 1 Sneed, 158; 2 Swan Rep., 117; 3 Sneed, 89; 29 Ala., 288; 34 N. Hamp., 534; *Woostock Bank vs. Downer*, 1 Williams' Rep., Vermont, 2d American Leading Cases.

MORRIS, SPEED, and G. A. CALDWELL, for appellees.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

The appellant brought this suit, alleging, in substance, that on the 1st of October, 1857, one W. E. Culver, a banker in Louisville, owed the plaintiff \$1,430 53, and to other persons large sums, payable on demand, on account of money deposited with him; that a panic prevailed, and the confidence of the public in the ability of Culver, and other private bankers, to meet the demands of their depositors, had been greatly impaired. That the defendants, knowing that many persons had large sums deposited with Culver, and fearing that they would demand the same, and knowing that he could not meet said demands if made, on said 1st of October, or shortly after said day, in consideration that the plaintiff and the other depositors would forbear to withdraw their deposits, and would permit Culver to keep and use the same, during the panic or until he could conveniently pay them, and to prevent "a run upon him" and of sustaining his credit, did on said day, sign and deliver to Culver, and publish in the newspapers, the following instrument:

"Louisville, Oct. 1, 1857.

We the undersigned agree to guaranty the depositors of Wm E Culver in the payment in full of their demands against said Culver, on account of money deposited with him.

We have entire confidence in his ability to meet all demands.

JAMES THOMPSON,
LEVI TYLER,
ISAAC CALDWELL,
F. S. J. RONALD,

JAMES GUTHRIE,
WM. B. CALDWELL,
JOSEPH SWAGER,
W. H. STOKES."

That the plaintiff intended to withdraw his deposits from Culver on the said 1st day of October, and drew a check for that purpose; but said Culver showed him the said instrument, signed by said defendants; and that the plaintiff relying upon the guaranty therein contained, accepted the same and acted upon it, and suffered and permitted his said money to remain with said Culver on deposit, and did not insist on the payment of his said check, as he would have done but for said contract of the defendants. That said defendants delivered said guaranty to Culver for the benefit of all his depositors, and that Culver did exhibit and deliver the same to his depositors to obtain forbearance and indulgence, and to sustain his credit, of all which defendants had due notice. That Culver failed, and closed his banking house on the 5th of October, 1857, and that, though often requested he has failed to pay plaintiff said sum of \$1,430 53, or any part thereof, of which defendants had due notice. Wherefore he prays judgment against them for said sum of money.

The defendants demurred, upon the grounds 1st. That there was a defect of parties. 2d. That the petition did not state facts sufficient to constitute a cause of action. Upon the last ground the demurrer was sustained, and the petition dismissed. Afterwards, but during the same term, the plaintiff offered to file an amended petition, alleging, in substance, that the defendants, by delivering to Culver, and publishing in the newspapers, the aforesaid guaranty, waived notice of an acceptance of it by the depositors; which motion was overruled, and the plaintiff appealed.

In support of the first ground of demurrer, it is contended that the guaranty was intended to be obligatory only in the event that it should be accepted by all the depositors, and that such is its effect, and therefore all the depositors are necessary parties to this suit.

We are of a different opinion. The petition shows that the appellant alone is entitled to the money claimed by him; the other depositors have no interest in it, nor in this action. The fact, if conceded, that their acceptance of the guaranty was

necessary to render it obligatory in favor of appellant, did not make them necessary parties to his action.

Upon the second ground of demurrer several questions are made by counsel.

1. It is contended for appellant that the writing was not a propoosal to guaranty those depositors who might give indulgence to Culver; but an absolute guaranty of payment of all the deposits in Culver's hands, without any future action by the depositors.

This position is inconsistent with the petition, which alleges that the writing was executed in consideration of forbearance to be thereafter given to Culver by his depositors. Moreover, if this position of counsel is correct, the petition is defective; because it shows that there was no consideration for such an agreement. True, as suggested by counsel, a writing imports, *prima facie*, a valuable consideration; but the presumption of a sufficient consideration ceases to exist whenever the party relying upon the agreement undertakes, though unnecessarily, to show what was the consideration. (*Jerome vs. Whitney*, 7 *John.*, 321; *Bullitt vs. Ralston*, 1 *A. K. Mar.*, 331.)

The appellant undertook to show the consideration of this agreement, and the facts stated by him shows that there was no consideration, unless it consisted in future forbearance by Culver's depositors, which clearly could form no consideration for an absolute agreement by the appellees to pay said depositors without reference to such forbearance.

2. On the other side it is contended that the guaranty is void under the Statute of Frauds, because it does not sufficiently express the agreement of the parties. We perceive no material defect in the writing, unless it consists in its failure to state the consideration which induced its execution.

As a consideration is an essential part of every contract, and is not implied by the common law to support a contract *not* under seal, it was held by the English courts that writings not under seal, to be valid under the *Statute of Frauds*, must contain a statement of the consideration of the contract; and the doctrine appears to have been recognized by this court; but it was never applicable to contracts under seal, because,

as to them, the common law presumed a consideration. (*Livingston vs. Tremper*, 4 John., 416; *Douglass vs. Howland*, 24 Wend., 35; *Edelin vs. Gough*, 5 Gill., 103; *Childs vs. Barnum*, 11 Barb., 14.) But under the *Kentucky Statute of 1812*, (1 S. L., 343,) written contracts, whether sealed or not, imported a consideration, whilst under the *acts of 1801*, (*Ib.*, 331,) and of 1815, (1 *Ib.*, 345,) the consideration of such writings could be impeached by plea. In view of these provisions, which were adopted in the Revised Statutes, and which apply to contracts embraced by the *Statute of Frauds*, and apparently for the purpose of placing it beyond doubt that such contracts should stand upon the same footing as other written contracts with respect to the consideration, it was enacted, concerning contracts required to be in writing, that "the consideration need not be expressed in the writing;" it may be proved when necessary, or disproved, by parol or other evidence. (*Revised Statutes*, chap 22, sec. 1.)

Neither the language, nor policy of the statute, furnishes any ground for a distinction between executed and executory considerations. It is as dangerous to admit parol evidence of the one as the other.

It seems clear that this guaranty would not have been void under the statute of frauds, if it had been given in consideration of money paid to the guarantors by the depositors; and we perceive no ground for holding it void under that statute, if it is supported by any other sufficient consideration, whether executed or executory, though not stated in the writing.

There would be no room for doubt upon this point, but for the fact that the statements of the petition, as to the consideration, show that the contract, instead of being an unconditional guaranty, as it on its face purports to be, was a conditional guaranty, depending for its validity upon the performance of certain acts by the depositors. As it is not claimed in the petition that the guarantors made any other contract than that contained in the writing, the question whether or not the contract is void under the statute of frauds may be answered by determining whether or not there is a variance between the contract contained in the writing and that set forth

in the petition. We are clearly of opinion there is no such variance. In *Smith's Leading Cases*, vol. 1, page 628, 4 Am. Ed., it is said: "No rule of law is better settled than that a conditional promise for the payment of money becomes absolute as soon as the condition is fulfilled, and may be declared on as if it had never existed. (*Stone vs. Rogers*, 2 M. & W., 443.) For as the engagement of the promissor finally results, in such cases, in an unqualified obligation, the law implies an unqualified promise for its fulfillment. Thus, the indebtedness counts are sustained every day on promises, which, although contingent originally, have ended in an absolute liability." Our views as to whether there is a variance between the contract contained in the writing, and that set forth in the petition, is sustained by the foregoing authority.

It is also contended that appellant is estopped from relying upon the alleged consideration of forbearance with Culver because it is inconsistent with the writing. And, if not, yet that the petition is defective, because it does not show that the contemplated forbearance was to be given during such time as would form a consideration for the guaranty; because it does not show that ALL the depositors gave the contemplated forbearance; and because it does not show that the appellant agreed with Culver, or the guarantors, to give any forbearance.

In support of the first point, it is argued, that the object of the guarantors, as shown by the writing, was to inspire confidence, not only in Culver's ultimate solvency, but in his ability to pay all deposits at once if demanded, and thus to prevent a run upon him; that an offer to guaranty the depositors, if they would forbear to make demand until Culver could conveniently pay, would have impaired confidence in his ability to pay promptly, and might thus have caused a run upon him, and, therefore, that the averment of future forbearance, as the consideration of the guaranty, is inconsistent with the writing.

In our opinion the writing furnishes no foundation for this argument, except the expression of entire confidence in his (Culver's) ability to meet all demands. The guaranty contained in it, expressed, by implication, a doubt, at least, of his ability to pay *promptly*; and this expression of doubt is con-

sistent with the expression of confidence in his ability to meet all demands, but not with an expression of confidence in his ability to meet all demands promptly. If, as alleged, public confidence in Culver was impaired, and the guaranty was given in consideration of future forbearance to him, its necessary tendency was to deter and prevent depositors from demanding immediate payment; because, by doing so, they would have lost the benefit of the guaranty, without, perhaps, getting payment from Culver, and it may be presumed that the appellees expected the guaranty to operate thus in procuring indulgence for him.

The petition states that the guaranty was given in consideration "that the plaintiff and the other depositors would forbear," &c. If that was the consideration, the petition is defective in failing to allege forbearance by the other depositors. But perhaps the petition, in view of other parts of it, should be regarded as averring, in substance, that the defendants designed the paper as a guaranty to such of the depositors as might give forbearance to Culver, and that they executed it in consideration of such forbearance, to be given by the several depositors. That the averment of such a consideration is not inconsistent with the writing is obvious from the fact that the writing contains no statement concerning the consideration. If the petition had alleged that the guaranty was given in consideration of a certain per centage, to be paid by the several depositors, and that the plaintiff had paid the same, it seems clear that he could have maintained his action, without alleging that all the other depositors had paid the per centage expected from them. It seems equally clear, that, if the consideration was forbearance to Culver by the several depositors, the plaintiff can sue without alleging forbearance by *all* of them.

Nor do we concur in the opinion of the circuit judge, that the petition is defective because it fails to aver that the plaintiff agreed with Culver, or with the guarantors, that he would give indulgence to Culver. If, as alleged, the guaranty was given in consideration that the several depositors would forbear to demand their deposits, the giving of forbearance was

sufficient, whilst an agreement to give it, without doing so, would *not* have been sufficient.

We are also of opinion that, if the consideration was forbearance to Culver during the panic, or until he could conveniently pay, his failure and the close of his house on the 5th of October dispensed with the necessity of further forbearance; and that forbearance until that time formed a sufficient consideration to support the contract.

What was the consideration depends upon evidence not contained in the writing. The writing neither estops the plaintiff from showing that the consideration was forbearance by the several depositors respectively, nor the defendants from showing that the consideration was forbearance coupled with an agreement to forbear by all the depositors.

4. It remains to be considered whether or not notice to the appellees of an acceptance of the guaranty by the appellant was necessary; and, if it was, whether or not the petition avers such notice.

It is a general rule, that if a person offers to pay money upon the performance of an act by another, the performance of the act by the latter, without any notice of his acceptance of the offer, or of his intention to act upon it, gives him a right to demand the money. This rule applies to the offer of a reward for the return of lost property, and to many other cases. But it is settled in the tribunals of the United States, and of several States, as an exception to that rule, that where the offer is to guaranty a debt for which another is primarily liable, in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor; but the creditor must notify the guarantor of his acceptance of the offer, or of his intention to act upon it. This doctrine appears to have been rejected by the courts of New York, and of several other States; but the authors of the American Leading Cases, whilst they apparently question its correctness, concede, and the cases *cited* by them prove, that it is sustained by the decided weight of American authority. (*Amer. Lead. Cases*, 2 vol. pages 35 to 107.)

The importance of establishing a general rule concerning contracts of this character, which frequently arise between citizens of different States, furnishes a reason for following the rule adopted by the Supreme Court of the United States; and, though we are not aware that this court has heretofore expressly decided the question, it has repeatedly sanctioned the doctrine under consideration. (*Kincheloe vs. Holmes*, 7 B. Mon., 5; *Bell & Terry vs. Kellar*, 13 Ib., 381; *Low & Co. vs. Beckwith*, 14 Ib., 184.) Finally, it seems to us to be a just and reasonable doctrine, though, like every other general rule, it may sometimes operate with hardship. We do not mean to intimate, however, that its application in this case would so operate on the appellant; for, though his petition shows that he forebore to demand his deposits from Culver, upon the faith of the guaranty, it does not certainly appear that he would have gotten his money if he had demanded it. This, however, does not affect the merits of the legal questions involved.

The reason for this doctrine was thus stated in *Douglas vs. Reynolds*, (7 Pet., 113:) "A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed intends to give credit on the faith of it or not. It may be most material, not only as to his responsibility, but as to his future rights and proceedings. It may regulate in a great measure his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially it is important in the case of a continuing guaranty, since it may guide his judgment in recalling or suspending it."

These reasons apply to the case before us, and we perceive no ground upon which it can be excepted from the operation of the rule founded upon them.

The fact that the guarantors, by inquiry from the person in whose favor the guaranty was given, might perhaps have learned what had passed between the guarantees and himself, has existed in many other cases, and has not been held sufficient to dispense with notice.

The rule is, that a person, thus proposing to become surety for another, is not bound to inquire as to the acceptance of his proposal; the creditor who intends to hold him responsible for the debt of another must show that he had reasonable notice of such intention. This doctrine is not opposed by the decision in *Lent vs. Padelford*, (10 Mass., 230,) cited by appellant's counsel. In that case the only points decided were, that, in a suit against a guarantor, the plaintiff need not aver notice to the defendant that the principal debtor has failed to perform the contract, nor a special request to the defendant to pay the money. Nor is it opposed to the decision in *Kuscy vs. Lane*, (1 Met. Ky. Rep., 410,) cited also by counsel for appellant; in which a surety on a warehouse man's bond, stipulating that the principal would faithfully account for all tobacco that might be consigned to him, was held liable to a consignor, though he had not been notified of the consignment. It does not appear that the question under consideration was discussed by counsel, or considered by the court, in that case. If it had been, the court would probably have noticed several differences between that case and those in which notice has been required. (1.) That bond was not executed solely in consideration of future consignments to the principal obligor. A statute required a bond with surety to be approved by the council of Louisville, in order to secure to the principal the right to keep a tobacco warehouse. The bond was executed for that purpose; and, though it did not conform to the statute, the council, believing that it did, approved it, and, in consideration of it, authorized the principal to keep a warehouse; which was regarded as a sufficient consideration to support the obligation as a common law bond. (2.) As notice would not have been necessary if the bond had conformed to the statute, and as the surety, when he executed it, believed it did so conform, it was clear he did not expect notice. (3.) The consignor, finding that the principal was permitted to keep the warehouse, had a right to act upon the assumption that a statutory bond had been executed, and therefore was not in default in failing to give notice of his consignment.

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The petition contains no allegation of notice to the defendants, except the general averment, "of all which the defendants had notice." In our opinion the allegation of notice should be special, and such as would enable the court to determine, from the statements of the petition, whether or not the notice was given as the law requires. (*Lawson vs. Townes*, 2 Ala. R., 373; *Rapelye vs. Pardy*, 3 Conn. R., 438, and cases cited.) As the petition contains no special averment of notice, there is no question before us as to the time within which notice should have been given in this case.

It follows, from what has been said, that the demurrer to the petition was properly sustained, upon the ground that it did not state facts sufficient to constitute a cause of action.

The amended petition, offered by appellant, does not substantially differ from the original petition, except that it alleges in substance that the defendants, by the terms of said guaranty, its publication, and delivery to Culver, waived notice of acceptance thereof. This being an allegation, not of any fact, but of a legal conclusion deduced by the plaintiff from facts alleged in his original petition, was not a material allegation. The motion to file the amended petition was therefore properly overruled.

The judgment is *affirmed*.

CASE 22—PETITION ORDINARY—JANUARY 29.

Bank of Kentucky vs. Floyd et al.

APPEAL FROM THE WARREN CIRCUIT COURT.

1. The holder's discharging, or giving time to, any of the parties on a bill of exchange, will be a discharge of every other party who, upon paying the bill, would be entitled to sue the party to whom such discharge or time has been given. Thus the drawer and indorsers will be discharged by a release of the acceptor, or by a valid agreement between the holder and acceptor, in which the drawer and indorsers

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do not concur, whereby time is given the acceptor for payment of the bill after it is due.

2. But a discharge or release by the holder to any party upon the bill, will not discharge the antecedent parties who are liable to him for the debt, but will only discharge the subsequent parties. Thus, (the parties being severally liable, according to their respective positions, on the bill,) a release by the holder to the last two indorsers will not discharge the liability of either the drawer, acceptor, or prior indorser.

3. In such case the antecedent parties are not entitled to have the sums severally paid by the two indorsers to the holder of the bill, in consideration of their release, credited as payments upon the bill. The amount paid neither increased nor diminished the liability of the prior parties.

J. R. UNDERWOOD, for appellant.

J. C. & J. H. WILKINS, for appellees.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

In this action the plaintiff sought to recover a balance claimed to be due on a bill of exchange for \$2,500, dated 8th September, 1852, of which Davis was the drawer, Floyd the acceptor, Young the payee, and Arnold and Jones indorsers. The bill was made for the accomodation of Floyd, the acceptor. All the parties to the bill were sued except Jones, the last indorser, and the action was dismissed, before trial, as to Arnold.

The defenses relied upon in the answer were payment and want of notice, and the release, by the plaintiff, of the last two indorsers on the bill. The law and facts having been submitted to the court without the intervention of a jury, judgment was rendered dismissing the action; and the plaintiff has appealed.

On the trial the facts were agreed by the parties, and are substantially as follows. That the defendants had due notice of the protest of the bill, and that the plaintiff ought to recover, unless a payment which had been made by Arnold, on the 23d November, 1857, of \$103, and a payment by Jones, on the 13th July, 1853, should be credited as so much *paid on the bill*; that the two sums mentioned had been received by the plaintiff, who was the holder of the bill, under an agreement with Arnold and Jones respectively, to the effect that in consideration of the payment by them of the sums mentioned the

plaintiff was not thereafter to hold them liable upon the bill, but would look to the other parties for payment. And it was further agreed that the two sums mentioned made an amount equal to and greater than the balance due on the bill, and that the plaintiff claimed judgment on the ground that the two sums so paid to the plaintiff by Arnold and Jones ought not to be credited as payments on the bill.

This arrangement was, in effect and substance, a release by the holder of the several liabilities of the two indorsers, for the consideration stated. The release to Jones, who was the last indorser, was executed by the plaintiff in July, 1853, and the release to Arnold, who was next to the last indorser, was executed in November, 1857.

Upon these facts two questions arise:

1. Did the release of the last two indorsers operate to discharge the antecedent parties to the bill.
2. Were the antecedent parties entitled to the benefit of the sums paid by Arnold and Jones to the holder, in consideration of their release, as payments upon the bill.

First. It is well settled that the drawer and indorsers of a bill will be discharged by a release of the acceptor, or by any valid agreement between the holder and the acceptor, founded upon a valuable consideration in which the drawer and indorsers respectively do not concur, whereby time is given to the acceptor for payment of the bill after it is due. The rule, as stated in more general terms, is, that the holder's discharging, or giving time to, any of the parties on a bill, will be a discharge of every other party who, upon paying the bill, would be entitled to sue the party to whom such discharge or time has been given. (*Story on Bills, sec. 425*)

But it is equally well settled, as laid down in the authority cited, that a discharge or release by the holder to any party upon the bill, will not discharge the antecedent parties who are liable to him for the debt, but will only discharge the subsequent parties; since the antecedent parties are in no wise injuriously affected as to their rights by the discharge. (*Ibid, secs. 429, 430, and the authorities there cited.*)

It is clear then that the release to Arnold and Jones did not discharge the liability of either the drawer, acceptor, or prior indorser of the bill in question. The parties were severally, not jointly, liable, according to their respective positions on the bill, there being no evidence of any such agreement as would vary or modify such liability.

Second. The facts of the case render it certain that the two sums paid by Arnold and Jones were not intended, either by them or by the holder, as payments on the bill, but were paid and received as the consideration of the release by the holder of the separate liability of the two indorsers. There was no stipulations, and there is nothing in the record to authorize the deduction, that the arrangement between the holder and either of the two indorsers was intended for the benefit of any of the other parties to the bill.

On what principle then can the acceptor, or any prior party, claim the benefit of those payments, as a discharge *pro tanto* of their several liabilities? If Jones had either voluntarily, or by legal coercion, paid to the holder the full amount of the bill, it would have given him an immediate right of action against all or any of the antecedent parties. The payment would have operated to discharge his liability to the holder, but certainly not that of the other parties, and we do not see how the payment of a less sum, as the mere consideration of the holder's agreement to release him, can have any greater or different effect. As has been shown, the drawer and indorsers of this bill were not joint sureties of the acceptor, but were severally liable to the holder according to their respective positions on the bill. That holder had a right to compound with and release the last indorser upon such terms as they might agree on. The amount paid by the indorser for his release was altogether immaterial to the prior parties. It neither increased nor diminished their liability. They were bound for the entire debt, and had no right to inquire into the terms or conditions on which the release was obtained.

It results that the court below erred in dismissing the plaintiff's action.

The judgment is therefore reversed, and the cause remanded for a new trial and further proceedings not inconsistent with the principles of this opinion.

CASE 23—WILL CASE—FEBRUARY 2.

Sechrest, &c. vs. Edwards, &c.

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APPEAL FROM THE GRANT CIRCUIT COURT.

1. After a testator's name had been subscribed to the writing, he acknowledged it to be his will in the presence of two witnesses, who subscribed as such. The testator then made his mark to it between his christian and surname. *Held* to be a sufficient publication of the instrument as a will—the placing of the mark to it was unnecessary.

2. It is not material whether the names of the attesting witnesses, or that of the testator, be first subscribed, if the witnesses were present when the testator either wrote his name or acknowledged it as his signature, and, being called on for that purpose, actually witnessed or attested that fact. (1 *B. Mon.*, 114.)

3. The provision in regard to the attestation of wills in the statute of 1797 concerning wills, is the same in import and substance as the 5th section of chapter 106 of the *Revised Statutes*, (2 vol. 458.)

4. The execution of an instrument as a will by the testator, with the requisite solemnities, is presumptive evidence that he knew its contents and that it conforms to his intentions; and it is incumbent on those who seek to avoid it on the ground that it makes a disposition of his estate of which he at the time was not fully apprised, or had no knowledge, to establish the fact *aliunde*. (3 *A. K. Mar.*, 144; 1 *Jarman on Wills*.)

5. A testator, who was illiterate and could not read, furnished the draftsman with a previous will which he had made, and directed him to write his will like that, omitting the lands, as they had been deeded. The draftsman did so; and, as he would write a clause or paragraph, he would read it to the testator, who would approve what was written. In that way the whole instrument was read to and approved by him. *Held* sufficient to show that the testator knew the contents of the instrument.

6. Upon an appeal from an order admitting a will to record or rejecting it, to the circuit court and thence to the court of appeals, the latter is made the trier of the facts certified from the circuit court, without reference to and wholly independent of the finding of the jury; and, by applying the law to the facts, of which the court is

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made the sole trier, it determines whether the testamentary paper should be admitted to probate or rejected. The circuit court can only enter the mandate, with directions to the county court to make such orders as may be proper and necessary to carry out the judgment of this court. (*Rev. Stat.*, chap. 106, sec. 28; 18 *B. Mon.*, 61.)

7. Though subscribing witness to a will prove that, at the time the instrument was published, the testator was not of sound mind, his capacity may be established by other sufficient evidence. (5 *Mon.*, 199; 2 *B. Mon.*, 79.)

8. See the opinion for a particular statement of the evidence as to the mental capacity of the testator to make a will; from which, (to some extent conflicting,) it is held that, although the mental capacity of the testator was to some extent impaired by old age and physical infirmities, the facts decidedly preponderate in favor of his testamentary capacity at the time of the publication of the instrument, which is established as his will—there being no sufficient evidence of the existence or exercise of an unlawful influence over the testator to procure its execution. And refer to 2 *J. J. Mar.*, 331; *Ib.*, 340; 2 *B. Mon.*, 74; *Ib.*, 79; 1 *Jarman on Wills*, 53, 54.

9. Lawful influence, such as arises from legitimate or social relations, must be allowed to produce its natural results even upon last wills and testaments; and there can be no presumption of its unlawful exercise merely from the fact that it may be known to have existed and may to some extent have operated on the testator's mind.

10. A will is not to be condemned on account of inequalities in testamentary dispositions produced by such influence. It is only when it is exerted over the very act of devising—so as to prevent the will from being truly the act of the testator—that the law condemns it as a vicious element of the testamentary act.

JAMES O'HARA, Jr., for appellants, cited *Rev. Stat.*, sec. 5, chap. 106; act of 1797, 2 *Stat. Law*, 1538; 16 *B. Mon.*, 112; 2 *Bouvier's Law Dic.*, 124; 12 *Pet.*, 151; 3 *Bibb*, 494; 3 *Mar.*, 144; 1 *B. Mon.*, 115; 8 *Wash. C. C.*, 586; 4 *Ib.*, 262; 9 *Conn.*, 102; 1 *Litt.*, 102; *Ib.*, 252; 5 *Mon.*, 200; 2 *J. J. Mar.*, 341; 2 *B. Mon.*, 74; *Ib.*, 79; 7 *B. Mon.*, 196; *Ib.*, 658; 1 *Jarman on Wills*, 37, 38, 39, 41; 2 *Rev. Stat.*, chap. 106, sec. 36.

W. S. RANKIN, on same side, cited 2 *Met.*, 449; 17 *B. Mon.*, 369–90; 12 *Ib.*, 378; 1 *Bay*, 335; 3 *Mass.*, 236; *Ib.*, 330; 1 *Day*, 57; 1 *Litt.*, 252; 6 *J. J. Mar.*, 444; 2 *Ib.*, 340.

GARRET DAVIS, on same side.

T. N. & D. W. LINDSEY, for appellees, cited *Williams on Executors*, (side page,) 34, 35, 36; 5 *J. J. Mar.*, 92; 2 *Ib.*, 333; *Piatt's Will Mss. opin.*

JAS. B. BROOK, on same side, cited *Reed et ux vs. Creal*, *Mss. opin.*, June, 1860; *Rev. Stat.*, sec. 5, chap. 106; *Piatt vs. Piatt*, *Mss. opin.*; *Jarman on Wills*, 51; 18 *B. Mon.*, 58.

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J. M. COLLINS, on same side, cited *Rev. Stat., chap. 106, sec. 2; Platt's Will Case, Mss. opin.*

W. T. SIMMONS, on same side.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

By an order of the Grant county court, made at its December term, 1857, a paper, purporting to be the last will and testament of Charles Sechrest, deceased, bearing date the 3d day of November, 1855, was admitted to record.

From that order the present appellees appealed to the Grant circuit court, where an issue of "*devisavit vel non*" was submitted to a jury, who found said paper *not* to be the true last will and testament of said Sechrest; and, a judgment having been rendered in said court in conformity to the finding of the jury, Mary Sechrest and others, the chief beneficiaries in said paper, have appealed to this court.

The case has been very fully argued by counsel; and, after having carefully examined and considered it, we will endeavor to state our conclusions upon the points involved, without elaboration.

It is important, first, to determine whether there is sufficient proof of the publication of the instrument according to the forms and solemnities required by law.

Sec. 5, chap. 106, Rev. Statutes, (2 vol. 458,) provides, that "no will shall be valid, unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence, and by his direction; and, moreover, if not wholly written by the testator, the subscription shall be made, or the will acknowledged, by him, in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

J. J. Henderson and B. N. Carter are the subscribing witnesses to the instrument, and B. N. Carter was the draftsman.

Henderson proves that he was sent for to go to the house of Mr. Charles Sechrest. Upon his arrival he was conducted into a room, where he found B. N. Carter, with some papers before him on a stand, or table. In a few minutes after he entered

the room Charles Sechrest came in, and Carter, taking the contested paper in his hand, handed it to him, (Henderson,) and said to him, Mr. Sechrest wants you to attest his will. He then asked Sechrest if it was his will? He answered, it was; and "said that was the way he wanted his property divided." That he, (Henderson,) then said he must read the paper first, and Sechrest replied, that was right; and, after having read a clause or two, to satisfy himself that it was a will, he subscribed his name to it as a witness in the presence of Sechrest and Carter. That Carter then told Sechrest to make his mark to it, which he did, and then Carter subscribed his name to it as a witness, in the presence of Sechrest and himself.

In his cross-examination, Henderson stated that, after he had subscribed his name to the paper, "*Carter made the old man's mark*, and signed it himself;" but that discrepancy is not material, as the objection is made to the time when it was done, and not to the manner or by whom it was done. The foregoing is all the evidence in relation to that particular point, and the question arises, was that a sufficient publication, under the requisitions of the statute *supra*?

It may be assumed that the name of Sechrest had been written to the paper before Henderson ever saw it, and certainly before he attested it; his name is written out in full upon the paper as copied in this record, and the mark is placed between the christian and surname. Henderson proves the mark was made after he subscribed it as a witness, but does not prove the name was written afterwards; he only proves that his name and Carter's were written after he saw it. So that Sechrest's name must have been subscribed to the paper before he saw it; and, after his name had thus been subscribed to the paper, he acknowledged it to be his will, in the presence of the two witnesses, who subscribed it as such—which was a compliance with the requisitions of the statute—and the placing the mark to it, whether by Sechrest or Carter, was wholly unnecessary.

But, even if the name of Sechrest was subscribed at the time he made his mark, or after Henderson had subscribed his

name as a witness, we apprehend it would have been sufficient.

We are not aware of any adjudication of the question since the adoption of the Revised Statutes; but, in *Swift et ux vs. Wiley*, (1 B. Mon., 114,) the point was directly before the court, under the statute of 1797 concerning wills, the provision of which in regard to the attestation of wills is the same in import and substance as the section, *supra*, of the Revised Statutes; and in that case it was held, that it was not material whether the names of the attesting witnesses, or that of the testator, shall have been first subscribed, if the witnesses were present when the testator either wrote his name, or acknowledged it as his signature, and, being called on for that purpose, actually witnessed or attested that fact. Here the witnesses were both present when Sechrest acknowledged the execution of the instrument, and they attested the fact; which must be deemed sufficient.

It is again contended that the judgment of the circuit court is right because the proof does not show that the instrument was ever read to Sechrest; that he was illiterate, and could not read it himself, consequently he could not have known its contents, and it could not therefore be regarded as his will. It is certainly true that a testator ought to know the contents of his will, otherwise it could not be said to be his will. But it seems to us that the evidence of Carter relieves the case of every difficulty on this point; for he states that he had a previous will of Mr. Sechrest, in the handwriting of Lewis Myers, by him when he did the writing, and that Sechrest told him to write the will like that, omitting the lands, as they had been deeded; and he did so. That he would write, read to him, (Sechrest,) and he would approve—obviously meaning that, as he would write a clause, or a paragraph, he would read it to Sechrest, and he approved what was written; and, in that way, the whole instrument, as we are authorized to conclude, was read to him, and he approved it.

Besides, the execution of the instrument by Sechrest, with the requisite solemnities, is presumptive evidence that he knew its contents, and that it conforms to his intentions; and it is in-

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cumbent upon those who seek to avoid it on the ground that it makes a disposition of his estate of which he at the time was not fully apprised or had no knowledge, to establish the fact *aliunde*, which in this case has not been done. (*Shanks et al vs. Christopher et al.*, 3 A. K. Mar., 144; 1 *Jarman on Wills.*)

It is next argued by the counsel for appellees that the law was properly expounded to the jury in the instructions allowed by the circuit judge, and, as the evidence was conflicting upon the issue submitted to them, this court should not disturb their verdict.

What effect, (if any,) is to be given to the verdict of the jury, depends upon the construction to be given to *sec. 28, chap. 106, 2 vol. Rev. Stat.*, 466, conferring jurisdiction on this court in will cases, by which it is provided that, "A writ of error or an appeal shall lie from the county court to the circuit court of the same county, and thence to the court of appeals, from every order admitting a will to record, or rejecting it. The circuit court and court of appeals shall try *both law and fact*; but the court of appeals shall not hear or adjudge any matter of fact pertaining thereto, other than such as may be certified from the circuit court, &c."

It is very clear, from the unambiguous language of this section, that the court of appeals is made the trier of the facts certified from the circuit court, without reference to, and wholly independent of the finding of the jury; and, by applying the law to the facts, of which the court is made the sole trier, determine whether the testamentary paper should be admitted to probate, or be rejected; and, having determined that matter, the only thing to be done is to have the mandate entered in the circuit court, with directions to the county court to make such orders as may be proper and necessary to carry out the judgment of this court.

This exposition of the enactment, *supra*, conforms to the opinion of this court in the case of *Overton's heirs vs. Overton's ex'r.*, (18 B. Mon., 61,) and to the manifest intention of the Legislature.

Having disposed of the foregoing preliminary points we proceed to the consideration of the main question, which is: Had Charles Sechrest, at the date of the contested paper, sufficient mental capacity to make a valid disposition of his estate by will?

About sixty witnesses were examined as to the capacity of Charles Sechrest; thirty odd for the appellants, and twenty odd for appellees. The number is too great, therefore, to undertake a minute examination and analysis of the testimony of each witness; but, as the evidence of Carter, the draftsman of the paper and one of the subscribing witnesses, is relied upon by appellees as sustaining their side of the issue, and as, moreover, the part he acted and his position afforded to him a favorable opportunity to inform himself as to the true mental condition of Charles Sechrest at the time the instrument was written, his testimony will be scrutinized with some care.

This witness states, in substance, that he became slightly acquainted with Charles Sechrest in 1848. That he occasionally called at his house and saw him, but had no particular conversation or transaction with him until he wrote the will. At that time his mind was about the same as he had seen it before; no material change was observed. He wrote some eight or nine deeds from the old man to his children, and had a will of Mr. Sechrest before him, written by Lewis Myers, but did not recollect its contents. He had also before him plats of the different tracts of land, and drew the deeds by said plats. The deeds were for the several tracts separately; the "Germany lands" were conveyed to the three boys; the home place was divided between his two daughters, the Mistress Lyons, and his youngest son George. That he was but little acquainted with the old man, and could not say much about his mind.

To the question asked him, whether in *his opinion* Mr. Sechrest had intellect enough, at the time, to understand the business he was engaged in, he seems to have declined giving a direct answer, but proceeded to detail what occurred at the time, which was, in substance, that he seemed to fail in his memory about some of the items, and, in order to refresh his memory, the witness would read from the old will, write and

read to him, and he would approve. He proved, upon cross-examination, that he was a dull, ignorant man; seemed to be forgetful; that the names of his children, and the disposition of his property, would be suggested to him by hearing the witness read from the old will, and sometimes Mr. Sechrest would make suggestions himself; that he told him to write the will pretty much as the old will, which was before him, noting the lands which had been conveyed. He also proved that "he thought it doubtful if" the old man could have dictated the will which he wrote, without the aid of the Myers will, and his suggestions. That he wrote on slips of paper, read to him, and he would *acquiesce*; the witness using the word *acquiesce* because, (as he expressed it,) that was the most appropriate "word to express the *idea* "

If the witness had stated no other facts, the foregoing would perhaps have authorized the conclusion reached by appellants' counsel. But in addition to these, he stated that the boys James and Nuck applied to him twice to go down and write their deeds, and Robert Lyons applied to him once; that he went each time he was applied to. The first time he went the old man seemed not to be in a good humor about the business; expressed his fears that if he made the deeds it would interfere with his will. Witness told him that his will could be written over, showing that the deeds had been made, and in a way so as not to interfere with his will. He did not, however, succeed until he made his third visit, and he was then only able to get the old man to yield by assurances that he could make the deeds, and then have a will written showing the facts, and thereby accomplish his fixed purpose of disposing of the balance of his property by will.

The Myers will, (as it was called,) was written by Mr. Lewis Myers, as he proves, between the years 1845 and 1849. From that period, until the writing of the deeds, it had been carefully preserved by Mr. Sechrest. From his conversations and conduct in relation to it, as proved by Carter, we cannot doubt that he recollected its provisions and was entirely satisfied with it. By that will he had devised to his three sons James, Robert and Francis, the same lands which he subsequently

conveyed to them in the deeds written by Carter. He therefore manifested great unwillingness in any way to interfere with that will, for fear his fixed and cherished purpose would be defeated.

If Carter, after visiting Mr. Sechrest three times, and learning his plans and desires in regard to the Myers will, believed that he had not then sufficient mental capacity to make a valid will, or even regarded it as a doubtful question, but, notwithstanding, prevailed upon him to change or destroy that will, and to make the deeds and the second will, by assurances that his purposes would be as certainly effectuated in that way as by preserving the former will, the part he acted in the business cannot be approved, and but little weight should be given to his statements.

But, if he had even proved that at the time the instrument was published, C. Sechrest was not of sound mind, it might have been established by other sufficient evidence, as was held by this court in the matter of *Alsey Howard's will*, (5 Mon., 199;) *Reed's will*, (2 B. Mon., 79.)

A number of the witnesses, examined for appellants, swore they had known C. Sechrest long and intimately; that they had business transactions with him, some of them just before, and some very soon after, the date of the contested paper; that he, at all times when with them, understood the business he was engaged in, and did it prudently and sensibly; that he was a money lender, both before and after said period, and employed a large capital in that way; small sums he loaned at an interest of 12 per centum per annum, and large sums at 10 per centum per annum; that he never loaned unless at these rates, and always had his debts well secured; that he owned a large farm where he lived, which he managed himself, and made it profitable; that, although illiterate, he could calculate interest by his head with great accuracy, and relied more upon his own calculations than he did upon the calculations of others made with figures; that he talked sensibly and rationally upon all business transactions, and on all other subjects upon which he conversed, and managed his farm and all his affairs with judgment and success.

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James Martin, a witness sworn for appellees, who had known Mr. Sechrest for 17 or 18 years, lived with him in 1856, and certainly had the means of being fully informed as to the mental capacity of the old man, says, "he then," (referring to the time he lived with him in 1856,) "directed what to do, when to plant and when to sow; he managed his farm himself, by his hands and his hirelings; his boys did not interfere with that; he understood these things very well; he was drowsy and dull, but, when aroused, he would talk sensibly." He never "knew him to talk or act foolish."

On the other side the witnesses proved, from his appearance, that Mr. Sechrest, at the date of the will, was far advanced in years. James R. Sechrest, (his nephew) proved he was about 83 years of age at the time of his death, according to the information he had received from his father. All the witnesses concur in the statement that some of the physical infirmities of old age were upon him. He had in a great degree lost his action—his hands were palsied, his sight was dimmed, and his hearing was impaired. Some of the witnesses swore that for a few years before his death, when they would meet with him, he did not recognize them, although they had been in former years well acquainted with him. Penick proved he met with the old man in 1855, or 1856—rather thought it was in August, 1856—and he did not know him, and that he "had a vacant and unmeaning stare of his eyes;" that he had a business transaction with him in 1849, but from that time until he saw him in 1855, or 1856, he had had no conversation with him. Others proved that he appeared dull and somewhat stupid, but that, when aroused, he understood the subjects of conversation; and no witness on that side proved that he acted foolishly, or failed to converse with sense, except Bernard Schwerman, who stated "he saw the old man in 1853 at his own house when he did not know him, and he talked flighty"—and John Layle, who proved that once in his presence "*he talked simple.*"

To some extent, then, it must be admitted, the evidence is conflicting, as is almost always the case, where the question of capacity is involved; growing out of the different circum-

stances under which the party, whose state is the subject of inquiry, is seen by the witnesses, and the particular standard erected by each one for himself by which to test the question.

But after mature consideration of all the evidence on both sides, we are of opinion that, although the mental capacity of the testator was, to some extent, impaired by old age and physical infirmities, the facts decidedly preponderate in favor of his testamentary capacity at the time of the publication of the contested paper. (*McDaniel's will*, 2 J. J. Mar., 331; *Elliot's will*, *Ibid*, 340; *Watson vs. Watson's heirs*, 2 B. Mon., 74; *Reed's will*, *Ibid*, 79; 1 *Jarman on Wills*, 53, 54.)

The next and last ground relied upon to invalidate the will, is, that it was obtained by the undue influence of one or more persons, interested in having it made as it was.

No witness proves that Mrs. Sechrest had any desire that either of the wills should be made. His three sons knew they were to have the "Germany lands," as they were called, and were no doubt anxious to have deeds made to them for their respective parcels by their father, and perhaps may have importuned him to make the deeds, but he had resisted them with firmness, and never yielded until he was convinced by Carter upon his third visit, that it could be done without interfering with his will in other respects. For years before, it was his fixed purpose to dispose of his property by last will and testament. Some time between 1845 and 1849, he had executed a will, which he had carefully preserved; that will was never changed or modified, until the conveyances were made for the lands to those to whom he had given them, or the larger portion of them, by the will. Carter proves expressly that, when the last will was written, no one was present but himself and the testator; that there was no interference by any one whatever; that the former will was before him at the time, and he was directed by the testator to write the last will as it was written, "noting the lands which had been conveyed," which directions he obeyed.

We do not therefore, find, from any proof in this record, that either of said testamentary papers were procured by any improper influence of any kind from any source whatever. Nor

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is it shown that the disposition of the property is different in this will from the disposition made of it in the former will, except as to the land. The provisions of the former will in relation to the other property were not remembered by Carter or Myers.

Lawful influence, such as arises from legitimate or social relations, must be allowed to produce their natural results even upon last wills and testaments. And there can be no presumption of its unlawful exercise merely from the fact that it may be known to have existed, and may to some extent have operated on the testator's mind. Such influences naturally produce inequalities in testamentary dispositions; but a will is not to be condemned on that account. It is only when such influence is exerted over the very act of devising, so as to prevent the will from being truly the act of the testator, that the law condemns it as a vicious element of the testamentary act.

We are of opinion that there is no sufficient evidence in this case of the existence, or of the exercise, of an unlawful influence over the testator to procure the execution of the will; and, as we are also of opinion that he was at the time of its publication of sound and disposing mind and memory, it should be established as the true last will and testament of Charles Sechrest, deceased.

The case of *Reed vs. Creel & Harrison* differs essentially from the present case.

The judgment of the court below is reversed and the cause remanded, with directions to affirm the judgment of the county court of Grant county admitting the will to record.

CASE 24—PETITION ORDINARY—APRIL 9.

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Taylor & Son vs. Stowell, Chamberlain, & Co.

APPEAL FROM THE KENTON CIRCUIT COURT.

1. Courts of equity would always entertain jurisdiction in cases of set off, where the demands were connected, or where the one sought to be set off formed the consideration of the other.

2. The only exception to the rule, *supra*, was, that if the claim proposed to be set off was for unliquidated damages, the chancellor would not, on account of the mere connection between the demands, first liquidate the damages, and then make the set off, *where there was a plain and adequate remedy at law*. But—

3. Where the existence of any extraneous fact is shown, calculated to defeat or impair the efficacy of the legal remedy, such as the insolvency or non-residence of the plaintiff or his assignor, the jurisdiction of the chancellor, even in cases of unliquidated demands, was unquestionable.

4. The law on the subject, *supra*, has not been changed by the Civil Code. (2 *Met. Ky. Rep.*, 143.)

5. A demand for unliquidated damages, for breach of warranty of the quality of a commodity for which the note sued on was given, may be relied upon as an equitable set off against the note, when the vendor is insolvent or non-resident, even where the note is in the hands of, and the action upon it brought by, a remote assignee of the vendor.

6. *Quere.* Does the defense, *supra*, amount to a valid counter claim in an action by the assignee of the note?

7. Objection for want of necessary party to an answer containing a set off must be taken in one of the modes prescribed by the Civil Code (sec. 123—) otherwise, it is waived.

8. Every material allegation of new matter in an answer, relating to the set off therein relied on, where there is no reply, must be taken as true.

CAMBRON and FISK, for appellants, cited 1 *Met.* 446; 2 *Littell*, 228, 229; 3 *B. Mon.* 423, 421; 9 *Id.*, 507; 1 *Greenleaf's Ev. secs.* 284, 304; 2 *Parsons on Contracts*, 66, 67, and note; 1 *Mass.*, 297; 7 *Mass.*, 518.

SIMPSON & SCOTT, for appellees, cited 2 *Met.* 144, 146; 5 *Mon.*, 273, 274.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

Stowell, Chamberlain & Co., as remote assignees of Crandle, brought this suit on a note executed by Taylor & Son to Crandle for \$712 36.

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The defendants answered, alleging in substance that the note was given as part of the consideration for a raft of pine lumber which they bought of Crandle, amounting, at the price agreed on, to \$2,137 08, all of which had been paid except the amount of the note sued on; that at the time of the purchase and of the execution of the note, doubts were entertained as to the quality of the lumber; that it was feared the lumber would dry or season "*shaky*," and said Crandle, by way of inducing the defendants to purchase, agreed that the lumber should turn out from a fourth to a third of what was known as *first common and clear*, and that if, in drying, said lumber or any part should prove to be *shaky*, he would make it all right by an abatement in the price. That a large portion of the lumber did dry or season *shaky*, and did not turn out from a fourth to a third common and clear, and that in consequence of the defective quality of the lumber they have sustained loss and damages to the amount of over \$500, which they claim should be set off against the note. They charge that said Crandle is a non-resident of the State, &c.

To this answer the plaintiffs demurred *generally*, the demurrer was sustained, and the defendants had leave to amend, which they did by reiterating the foregoing facts, and alleging in addition that, at the time of the sale, Crandle knew, and fraudulently concealed the defective condition and quality of the lumber which was then lying in the river and so covered by the water that its quality could not be seen or known by the defendants.

To this amended answer there was no demurrer or reply. The case was submitted to a jury who, after hearing the evidence introduced by the defendants, were peremptorily instructed to find for the plaintiffs. A verdict and judgment was rendered accordingly, and the defendants have appealed.

The first, and indeed, the only question necessary to be decided is, whether the answers or either of them present a valid defense, legal or equitable, to the action.

The rule was well settled, prior to the adoption of the Civil Code, that courts of equity would always entertain jurisdiction in cases of set off, where the demands were connected, or

where the one sought to be set off formed the consideration of the other. The only exception to this rule was that if the claim proposed to be set off was for unliquidated damages, the chancellor would not, on account of the mere connection between the demands, first liquidate the damages and then make the set off, *where there was a plain and adequate remedy at law*. But where the existence of any extraneous fact is shown calculated to defeat or to impair the efficacy of the legal remedy, such as the insolvency or non-residence of the plaintiff or his assignors, the jurisdiction of the chancellor, even in cases of unliquidated demands, was unquestionable.

The law on this subject has not been changed by the Civil Code, as was in effect decided in the recent case of *Shropshire vs. Conrad*, (2 Met. Ky. Rep., 143.)

In this case the allegations of both the original and amended answer are clearly sufficient to entitle the defendants to the damages sustained by them in consequence of the breach of warranty on the part of their vendor, Crandle, with respect to the quality of the lumber which formed the consideration of the note sued on. And it is equally clear that they are equitably entitled to have that claim set off against the note: *first*, because of the connection between the two demands, and *secondly*, because of the non-residence of Crandle, the assignor of the plaintiffs.

It is said in argument that if the defendants had made their vendor a party, and had alleged and proved his *insolvency* at the time he assigned the note, they would then have been entitled to relief by way of equitable set off. But surely the non-residence of the vendor forms as complete an obstruction to the defendants' remedy by separate action on the warranty, as his insolvency would have done, and for that reason would authorize the same equitable relief. And even if Crandle were a proper or necessary party, the objection to the answer for the want of parties not having been taken in either of the modes prescribed by the Code was waived. (Sec. 123.)

As the plaintiffs wholly failed to reply to the answer, every material allegation of new matter therein contained, relating

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to the set off, was of course to be taken as true on the trial, and there was nothing for the court to do, as the case was presented, but to ascertain the amount of the damages claimed. This could have been done as well by the intervention of a jury as by the appointment of a commissioner, or by the court itself.

It has been urged in argument that the defense set up in the answers does not amount to a valid *counter-claim*, because it is not a demand or cause of action against the plaintiffs or either of them, but is a cause of action against the payee of the note; and that it therefore lacks one of the essential characteristics of a counter claim as defined by the code. (Sec. 126.)

The view already taken of the case dispenses with the necessity of deciding this point, and we therefore pass it by, with the bare suggestion that we might hesitate to adopt so rigid and literal a construction of this provision as would tend to defeat one of its most obvious purposes—that of preventing circuity and multiplicity of actions.

For the reasons stated the judgment is reversed, and the cause remanded with directions to overrule the demurrer to the original answer, and for further proceedings not inconsistent with the principles of this opinion.

CASE 25—PETITION EQUITY—APRIL 10.

Wickliffe's Executors vs. Preston et ux.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

1. Prior to the adoption of the Revised Statutes a sale by a testator, after making his will, of either land or personalty, thereby devised, defeated the will *pro tanto*. Since the statute the rule is otherwise as to devises and bequests to an heir of the testator, in which case such sale is not now an ademption of the legacy or devise unless the testator so intended—and the burden of showing such intention rests on those claiming against the will. (9 B. Mon., 367; 3 Met. Ky. Rep., 473; 3 Revised Statutes, chapter 46, article 5, sections 1 and 2.)

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2. The statute *supra* applies to land as well as to personal property. (*Authorities supra; Revised Statutes, chapter 21, section 25.*) And a sale of land for money is a conversion of it within the statute.

3. The Revised Statutes abolish the distinction between the words "bequeath and devise," "legatee and devisee," "bequest and legacy." (*Chapter 21, section 25.*)

4. A provision in a will that if the testator should sell real estate devised to one of his children, and should not by will, deed or gift, substitute other real estate in lieu thereof, she was to have its value assigned her out of the testator's real estate not specifically devised—and the absence of such a provision concerning other devisees—held not sufficient to show that the testator intended to adeem the devise to the latter if he should sell the lands devised to them; a conclusion strengthened by other clauses of the will.

5. That a testator sold land devised to one of his heirs to pay his debts, which, if not paid by him, would have fallen upon the residuary which he directed to be equally divided between his heirs after the payment of debts—not sufficient to show an intention to adeem the devise.

JOHN PRESTON, for appellant, cited 2 *Vern.*, 337; *Rev. Stat.*, title, *Wills*, sec. 12; *White & Tudor's Leading Cases in Equity*, 346; 2 *Cox*, 182; 9 *B. Mon.*, 367; 2 *Ves.*, 624; *Ward on Legacies*, 9 and 13.

JNO. W. BARR, on same side.

G. A. & I. CALDWELL, for appellees, cited *Toller's Law of Executors*, 19, 23; *Rev. Stat.*, chap. 46, art. 3; 3 *Met. Ky. Rep.*, 473; *Rev. Stat.*, chapter on *Wills*, sec. 12.

W. PRESTON, on same side, cited 4 *Kent*, 528, 529; 7 *John.*, Ch. Rep., 258; 1 *Jarman on Wills*, 145, 146, 147, 148; *Rev. Stat.*, chap. 106, sec. 12; *Id.*, chap. 46, art. 3; 7 *Paige*, 97; 5 *Litt.*, 28; 4 *J. J. Mar.*, 627; 2 *Dana*, 54; 7 *J. J. Mar.*, 58; 3 *Dana*, 477; *Rev. Stat.*, chap. 21, sec. 25.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Robert Wickliffe, by a codicil to his will, made in 1854, devised to his daughter, Margaret, wife of Wm. Preston, certain property, including a tract of land called Piedmont, and containing 3,300 acres. In 1858 he authorized his agent to sell that part of said land "lying over Slate creek," being, as it appears, about 500 acres, if he could get \$25 per acre. In July, 1859, the agent sold 199 acres of said land for \$25 per acre, one-third payable on the 1st March, 1860, and the residue in one and two years thereafter, with interest from that date, and gave a bond therefor. The testator was informed of the

sale and assented thereto, but died on the 1st September, 1859, without having executed a conveyance. Preston and wife sued his executors for the value of said 199 acres, and obtained a judgment against them for \$4,975, being the price for which the land was sold, with interest from March 1, 1860. From that judgment this appeal was taken.

The only question that we need to consider is, whether or not the sale of the land was, to that extent, a revocation or ademption of the devise.

Formerly, a sale by a testator, after making his will, of either land or personal property thereby devised, was an ademption of the legacy or revocation of the devise. It was not a question of intention. The ademption was effected upon the principle that the subject was annihilated, or its condition so changed that nothing remained to which the terms of the will could apply. (*Ross vs. Carpenter*, 9 B. Mon., 367; *Hocker vs. Gentry*, 3 Met. Ky. Rep., 473.) In the last named case, however, it was said, that "it seems clear, not only that these rules have been changed, both as to devises and bequests to an heir of the testator, but that the burthen rests on those claiming against the will to show that the testator, in selling the property, intended to adeem the legacy or devise. (*Rev. Stat., chap. 46, art. 3.*") But as no reasons were stated for that conclusion, and as the sale in that case was of personal property, we propose to notice in detail the arguments advanced to prove that the sale in this case was *pro tanto* a revocation of the devise.

The statute above referred to is as follows:

"§ 1. The conversion, in whole or in part, of money or property, or the proceeds of property devised to one of the testator's heirs, into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise, unless the testator so intended, but the devisee shall have and receive the value of such devise, unless a contrary intention on the part of the testator appear from the will, or by parol or other evidence."

"§ 2. The removal of property devised shall not operate as an ademption, unless a contrary intention on the part of the

testator is manifested in like manner." (*Rev. Stat. chap. 46, art. 3.*)

The appellants contend that this statute does not apply to a conversion of land, but only applies to a conversion of personal property by a testator, because the word "conversion" is properly applicable only to personalty, because the word "ademption" is properly applicable only to bequests of personalty, and because the second section of the article cited clearly applies only to personalty, since land cannot be removed.

According to the argument, if a testator should devise \$10,000 worth of personalty to one child and \$10,000 worth of land to another, and should afterward sell both the land and personalty, the former devise would be defeated and the latter would not. We do not perceive what motive, if any, the Legislature had for making such a distinction. No such distinction existed before the statute, but a sale of either land or personalty defeated the will *pro tanto*. Nor do we find in the language of the statute any convincing proof that it was designed to change the law merely with respect to personalty, and thus to establish the distinction contended for.

The word "conversion" has a technical meaning with reference to certain tortious acts, and in that sense applies only to personal estate. But it was not used in that sense by the framers of this statute, since such tortious acts cannot be committed by a testator with reference to his own property. It has another meaning which applies alike to real and personal property. The purchase of land with money is a conversion of money into land; and the sale of land for money is a conversion of the land into money. And even a direction, in a deed of trust or will, to buy land with money, or to sell land for money, is, in equity, a conversion of the money, into land and of the land into money. The word conversion, therefore, as used in this statute, is as applicable to real as to personal estate.

Though a sale of land by a testator was formerly designated, technically, as a revocation of the devise, we do not regard the omission of the word "revocation" from the statute under consideration as entitled to much significance. It is

contained in a chapter entitled, "Heirs and *Devisees*," and in an article entitled, "Ademption of Legacy, &c," and it speaks of the ademption of the legacy *or devise*, and declares that the *devisee* shall have the value of such adeemed *devise*; in each of which respects the language is technically incorrect, according to the former rules, if it was designed to apply only to bequests of personalty. But in another part of the Revised Statutes it is declared that "the words 'legatee' and 'devisee' shall each be held to convey the same idea, and the words 'bequeath' and 'devise' to mean the same thing; and the words 'bequest' and 'legacy' shall each be held to mean the same thing; and to embrace and include either real or personal estate or both." (*Chapter 21, section 25.*) The framers of the Revised Statutes, having thus abolished the distinction between the words bequeath and devise, legatee and devisee, could properly use the word "ademption" with reference to real and personal estate.

Personal estate can be removed, real estate cannot. The provision concerning the removal of property devised applies, therefore, to personal estate only. But we do not perceive upon what principle this provision concerning an act that can only be committed with reference to personal estate, can be so construed as to limit to personal estate the provision concerning the conversion of property devised. Our conclusion is, that the statute applies to a conversion of real as well as personal estate, and that a sale of land for money is a conversion of it within the statute.

As the statute declares that the conversion of property by a testator shall not be an ademption of the devise, but that the devisee shall have the value of the devise, unless a contrary intention on the part of the testator appear from the will or by parol or other evidence, it necessarily follows that those claiming against the devisee must show that the conversion was made with an intention to adeem the devise. The sale of the land by the testator in this case raised no presumption, even, of such an intention; the burthen of proving the intention rests on the executors.

They contend that such an intention appears from the will. The testator had three daughters, to each of whom he made specific devises. Concerning one of them he declared as follows: "If I should sell or otherwise dispose of any of the real estate devised to Sally Woolley, and appropriate the proceeds to my own use, and not by will, deed, or gift, compensate or substitute other real estate in lieu thereof, then she is to have assigned her, out of my real estate not specifically devised, estate equal in value to what I may have disposed of, the value to be fixed at the price I may have sold it." It is contended that this provision concerning Mrs. Woolley, and the absence of such a provision concerning the other daughters, shows that that the testator intended to adeem the devises to the latter if he should sell the lands devised to them. This provision, if there was nothing else in the will to explain its meaning, would not perhaps be sufficient to show that the testator contemplated the discrimination between his daughters contended for by the appellants; because, in the first place, the testator may have expected to sell some of the land devised to Mrs. Woolley and not to sell any of that devised to his other daughters, and for that reason may have inserted the provision in question; and, in the second place, he may have inserted it merely for the purpose of giving land instead of money to Mrs. Woolley, in lieu of any of the real estate devised to her, which he might dispose of. Under the statute, without any provision in the will on the subject, she would have been entitled to the value in money of such estate; but he directs real estate to be assigned to her instead of money. The provision apparently evinces an intention on the part of the testator to discriminate between his daughters, merely so far as to give real estate to Mrs. Woolley in lieu of such of her devise as he might dispose of, leaving to his other daughters their right to the value, in money, of such of their devises as he might dispose of. Our belief that such was his purpose is strengthened by two other clauses of the will, in one of which, after having directed that each of his daughters should be charged with \$40,000 for previous advancements, he states that he had in fact advanced more than that sum to Mrs. Woolley and her husband, and

states his reasons for charging her with only that sum, and then expresses a hope that his other two daughters "would cheerfully accord and assent to the equal distribution of my undivided estate, as hereinafter made, on account of the reasons and considerations which influence me now to make and regard them as all equal in their advancements;" and in another of which, after devising to Mrs. Margaret Preston his mansion house, and declaring that she is to take and hold it as a gift from her mother, made to her as a testimony of her love and affection for her while she lived, he declares that "Margaret is to have this exclusive of her equal portion of my estate, and is not to be charged with its value." Our conclusion is, that an intention to adeem the devise of the converted land is not apparent from the will.

It is also contended that the testator sold the 199 acres of the Piedmont land for the purpose of paying his attorneys fees and other expenses, amounting to about \$6,000, incurred in a suit between him and Todd's heirs, concerning the Elleslie farm, which he also devised to Mrs. Margaret Preston, and that therefore he intended to adeem the devise by selling the land. What weight this argument would have been entitled to if the debt had been a charge upon the Elleslie farm we need not decide, because it was a general debt, which if not paid by the testator would have fallen upon the residuary which he directed to be equally divided between his heirs after the payment of debts. It might perhaps have been doubtful whether a sale of the 199 acres, to pay that debt, would, alone, have sufficed to show an intention to adeem the devise. But we need not decide that question for two reasons:

1. We are not satisfied that the land was sold for that purpose. The testator's letters show that he owed other debts to a large amount, which he was anxious to pay before his death. He did not direct a sale of so much of the Piedmont land as would pay said \$6,000, but authorized a sale of all of it "lying over Slate creek," being about 500 acres and worth over \$12,000. At the same time the agent was authorized to sell various other lands. The testator's object was to raise money enough to pay all his debts by selling so much of the 500 acres

and of the other lands just referred to, as would suffice to pay them all, including the \$6,000. The land authorized to be sold appears to have been worth more than the debts. The agent was not directed to sell the Piedmont land in preference to the other land. He was to sell any tract for which he could find a purchaser at a fair price. And there is reason to believe that, if enough of the other lands had been sold to pay all the debts, including the \$6,000, the testator would not have sold the Piedmont land.

2. The testator's first letter to his agent, concerning the sale of the Piedmont land, was dated Feb. 5, 1858. In that letter he did not speak of the \$6,000 debt, but said: "I shall be so hard run for money that I must sell something." In a letter to the same agent, dated Feb. 12, 1858, after stating that he had gained his suit with Todd's heirs, he said: "The charges of my lawyers upon me are excessive, and I must, through the coming year, spare as much from my expenses as will extinguish their fees." The supposition that he intended to make Mrs. Margaret Preston pay those fees would, in our opinion, be inconsistent with this letter, which evinces an intention on the part of the testator to relieve not only her, but his estate, from any loss on that account, by reducing his expenditures.

The judgment is affirmed.

CASE 26—PETITION EQUITY—APRIL 14.

Willis, &c. vs. Vallette.

Bowler, &c. vs. Same.

Ogden, &c. vs. Same.

APPEALS FROM THE FAYETTE CIRCUIT COURT.

1. There is no distinction, as to the notice necessary to bind a purchaser, between cases which do not come within the operation of the registry acts and those which do.

2. Implied or presumptive notice may be equally effectual with direct and positive notice; but then it must not be that notice which is barely sufficient to put a party upon inquiry. Suspicion of notice is not sufficient. The inference of a fraudulent intent affecting the conscience must be founded on clear and strong circumstances in the absence of actual notice. The inference must be necessary and unquestionable.

3. The general doctrine is, that whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding.

4. Where the party has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected, he is bound with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice. The proposition of law upon which this class of cases proceeds is, not that he had notice of a fact or instrument, which, in truth, related to the subject in dispute, without his knowing that such was the case, but that he had actual notice that it did so relate.

5. Constructive notice is established where there is satisfactory evidence that the party had designedly abstained from inquiry for the very purpose of avoiding notice. Not that he had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge.

6. If there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestae* would suggest to a prudent mind—if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser—there the doctrine of constructive notice will not apply; but the purchaser will in equity be considered a *bona fide* purchaser without notice.

7. A purchaser is legally chargeable with notice of an unrecorded lien, though he have no knowledge of its existence, if he have notice, actual or constructive, of the contents of the instrument giving the lien, though, under a mistake of the law, he may have supposed there was no lien.

8. *Quere.* Does the term "income bond" import any thing more than a bond payable out of income? And does a bond of a railroad company, payable out of its in-

come, and without other words importing a pledge of its income or property give a lien thereon?

9. An agent is only chargeable with constructive notice of those facts which he would have been led to a knowledge of by performing his duty according to the regular course of business.

10. The general rule is, that a purchaser without notice is not affected by notice to his vendor. This rule applies in favor of a purchaser of a bond secured by mortgage, (without a transfer of the mortgage,) from one who had notice of a prior incumbrance.

11. It is well settled in equity, with reference to debts secured by mortgage, that the debt is the principal thing and the mortgage a mere incident thereto; that a transfer of the debt passes the mortgager's interest in the mortgage property; and that his transfer of the mortgage, without the debt, passes nothing. (5 *N. Hamp.*, 430; 2 *Cowen*, 195; 19 *John.*, 325.)

12. Notice to an agent of the purchaser is constructive notice to the principal, and notice to the trustee is notice to the beneficiary. The notice must, however, be in the course of the transaction in which he is acting on behalf of the principal—otherwise it will have no legal or necessary connection with the latter. So, notice to a trustee, made long before the execution or contemplation of a mortgage to him, of a prior incumbrance, will not affect the *cestui que trust*. (2 *Lead. Eq. Cases*, Am. Ed., 106, 116-17.)

13. Facts before the court at the time of the original trial furnish no ground for a new trial, even if the decision upon them has been erroneous.

14. See the opinion for a statement of facts held insufficient to show that a subsequent holder under a recorded mortgage had either actual or implied notice of a prior incumbrance upon the property

HUNT & BECK and FINNELL & CHAMBERS, for appellants.

BUCKNER and ROBINSON & JOHNSON and GEO. ROBERTSON, for appellees.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

In July and November, 1854, and February, 1855, the Covington and Lexington Railroad Company issued certain bonds, called by them, and by persons dealing in them, "income bonds," of which the following is a specimen:

"The Covington and Lexington Railroad Company acknowledges itself indebted to Samuel J. Walker or bearer in the sum of five hundred dollars, negotiable and payable at the Paris Branch of the Northern Bank of Kentucky, five years after date, bearing interest from date at the rate of 10 per cent. per annum, payable semi-annually on the first day of May and November, at the said Bank, on the delivery of the proper coupon, being part of an authorized issue of \$200,000. For

the redemption of this certificate, and the payment of the interest, the property, rights, credits and income of said company is irrevocably pledged. In witness whereof," &c.

None of these bonds were secured by any recorded deed. A number of them were sold to various persons prior to March, 1856.

In June, 1855, said company executed a mortgage, which was duly recorded, to J. Winslow, trustee, to secure the payment of certain bonds, called by persons dealing in them "third mortgage bonds," the company having made two previous mortgages. In March, 1856, and afterward, the appellee, Vallette, purchased a number of said third mortgage bonds. In a suit brought by one Winslow against Vallette and others, the road and other property of the company were sold for payment of its debts, under an order of the court below, and a contest arose between holders of "income bonds," and Vallette, as the holder of "third mortgage bonds," concerning their rights to priority of payment out of the proceeds of the company's property. The court below having decided that Vallette was entitled to priority, Willis and other holders of "income bonds" filed petitions for a new trial, upon the alleged ground that, after the term at which the decision was rendered, they had discovered material evidence which they could not with reasonable diligence have produce at the trial. This appeal was taken from an order dismissing those petitions.

1. The principal question is, whether or not the newly discovered evidence is sufficient, in connection with that produced on the original trial, to show that Vallette, when he purchased the "third mortgage bonds," had notice of the sale of the income bonds, and of the fact that the holders thereof had a lien on the property of the company.

For the appellee it is contended that there is a distinction, as to the notice necessary to bind a purchaser, between cases which do not come within the operation of the registry acts and those which do; that, in the former, constructive or implied notice may suffice, whilst in the latter there must be clear and undoubted proof of actual notice; that this doctrine

was established by the English courts under the statute of 7 Anne, ch. 20, by which it was declared that unregistered deeds should be deemed "fraudulent and void against any subsequent purchaser for a valuable consideration," and that our Legislature, in declaring that unrecorded deeds shall be void against "any purchaser for a valuable consideration *not having notice thereof*," intended to establish as a rule of positive law the equitable doctrine established in England under the statute of Anne; and that, "if the income bonds operate on their face as conventional liens on the railroad, then these liens are like legal mortgages, and comes within the policy and are subject to the provisions of the registry acts."

After a careful examination of the subject, our opinion is, that the distinction contended for is not founded in reason, nor sustained by the weight of authority, English or American, and that it has never been recognized in this State, but was in effect rejected in the case of *Morton vs. Robards*, (4 Dana; 258,) and several other cases decided by this court. The law applicable to this case is, in our opinion, correctly stated in the following passages, taken from Kent's Commentaries, and from an opinion of Vice Chancellor Wigram:

"The Statute of New York postpones an unregistered deed or mortgage only as against a purchaser or mortgager *in good faith and for a valuable consideration*; and this lets in the whole of the English equity doctrine of notice. The statute law of many of the other States is not so latitudinarian in terms; and deeds not recorded are declared void as to creditors and subsequent purchasers; and in some cases they are declared to convey no title, or to be void as against all other persons but the grantor and his heirs. The doctrine of notice and its operation in favor of the prior unregistered deed or mortgage equally applies however, as I apprehend, throughout the United States, and it everywhere turns on a question of fraud, and on the evidence requisite to infer it. In pursuance of that principle, and in order to support, at the same time, the policy and injunctions of the registry acts in all their vigor and meaning, implied notice may be equally effectual with direct and positive notice; but then it must not be that notice which is bare-

ly sufficient to put a party upon inquiry. Suspicion of notice is not sufficient. The inference of a fraudulent intent affecting the conscience, must be founded on clear and strong circumstances, in the absence of actual notice. The inference must be necessary and unquestionable. Though the cases use very strong language in favor of explicit certain notice, yet it is to be understood as the true construction of the rule on the subject, that implied or presumptive notice may be equivalent to actual notice." (4 Com., 171.) "The general doctrine is, that whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding." (4 Com., 179.)

"Cases in which constructive notice has been established resolve themselves into two classes: *first*, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged incumbered or in some way affected; and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice; and, *secondly*, cases in which the court has been satisfied from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.

"The proposition of law upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which, in truth, related to the subject in dispute, without his knowing that such was the case; but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds, is, not that the party charged had incautiously neglected to make inquiries; but that he had designedly abstained from such inquiries, for the purpose of avoiding knowledge—a purpose, which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. In short if there is not actual notice that the property is in some way

affected and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind—if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply, there the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser without notice.” (*Jones vs. Smith*, 1 *Hare*, 55.)

Upon the original hearing it was proven that Vallette was a retired banker, residing in Cincinnati, which furnished the principal market for the sale of the securities of the Covington and Lexington R. R. Company; that he was in the habit of dealing in stocks, and of frequenting bankers’ and brokers’ offices, where those securities were sold; that in 1854 and 1855 “income bonds” were frequently sold, and advertised for sale in newspapers and bankers’ bulletins in Cincinnati; and that the principal office of said company was at Covington, opposite to Cincinnati, on the other side of the Ohio river. The newly discovered evidence, relied on by the appellants, consists of the facts, that, in April, 1855, Mr. Rennick, of the firm of Loker, Rennick & Co., of St. Louis, having a claim upon a Cincinnati firm, that had stopped payment, was offered “income bonds” in settlement, and after consulting with Vallette and others he took two of said bonds for \$1,000 each, of the issue of December, 1854; that Vallette advised Rennick to take them, because of the location of the road and its probable connections, which would in his opinion make it a paying road, and that he said that, in his opinion, the bonds might eventually be paid; that Vallette, when advising Rennick to take the bonds, said he had never seen one of them, and asked Rennick, if he got one, to let him see it, but Rennick thinks he neglected to show them to him; that on the 8th May, 1855, Vallette wrote to Loker, Rennick & Co., advising them to dispose of the bonds; that on the 11th May, 1855, they sent him the bonds to be disposed of by him according to his judgment; that he placed them for sale in the hands of Hewson & Holmes, brokers in Cincinnati, who sold them on the 31st May, 1855; and that Vallette, on the 8th June, 1855, remitted the proceeds to Loker, Rennick & Co.

It is proved, however, by six witnesses, (one of them a broker, four of them bankers,) who resided in Cincinnati, and dealt in these bonds, that in 1855-6 no one there regarded them as giving a lien on the property of the company; and Rennick testifies that neither he nor Vallette, nor any one else whom he consulted, regarded them as giving a lien; and there is no evidence that any one there did so regard them. The impression concerning them probably grew out of the fact, proved by one of the witnesses, that under the law of Ohio these bonds would not have given a lien even against a purchaser having notice of their contents. That Vallette did not regard them as giving a lien is proved by Rennick and by Vallette's letter of May 8th, 1855, in which, after speaking of the mortgage debt of the company, he says, "it will depend on the income of the business of the road whether those (income) bonds will be good or worthless." But it is contended that he is legally chargeable with notice of the lien, though he had no knowledge of its existence, if he had notice, actual or constructive, of the contents of the bonds. We incline to the opinion that such is the law; and that if Vallette knew that these bonds pledged the property of the company, he is chargeable with notice of the lien, though, under a mistake of the law, he may have supposed there was no lien.

To show that Vallette had actual notice of the contents of these bonds, it is urged that we must assume that he read one of the two which he received in May, 1855, or that he had previously read one at some office in Cincinnati, as he might easily have done, because in March, 1855, he expressed to Rennick a desire to see one of them. To give to that expression the effect contended for, it must appear, or be assumed, that it was not merely an expression of idle curiosity, but that it was an expression of a real desire to examine the bond in order to ascertain the character of the security, and that this desire was based upon some motive which may have probably induced Vallette to carry it into effect. It does not appear that he purchased any of the securities of the Covington & Lexington Railroad Company, or contemplated doing so, or had any personal interest with reference to them, prior to March,

1856. His motive, if he had any, for examining one of these bonds, may have ceased to exist before he saw one. If he had had any real motive or desire to see one, he would probably have gone at once to one of the offices he was in the habit of frequenting, instead of awaiting the chances of Rennick's getting one. In March, 1855, his only apparent interest with reference to these bonds was as the friend of Rennick. That interest would have prompted him to see the bond before advising Rennick to take it, if his object was to examine its contents and learn the character of the security. The fact that he advised Rennick to take it, without seeing it, conduces to prove that he did not consider an examination of its contents at all material in determining its value, and that his opinion concerning its value was based upon information derived from persons in Cincinnati who were dealing in these bonds, and who, according to the proof, did not regard them as giving a lien. That he felt any real interest or made any particular examination to ascertain the contents of these bonds, is rendered quite improbable by his letter of June 8, 1855, in which he speaks of them as "Cincinnati, Covington and Lexington Railroad Bonds." His misdescription of the name of the company certainly furnishes strong reason to believe that he did not at that time feel much interest nor possess much knowledge as to the character or contents of its bonds. The fact that in 1856 he invested over \$65,000 in the purchase of third mortgage bonds, at their market value, is also entitled to weight. It seems improbable that he would have done so without consulting a Kentucky lawyer as to the income bonds, if he had known that they contained upon their face a pledge of the company's property; and equally improbable that he would have done so if he had consulted a Kentucky lawyer. The facts, in our opinion, authorize nothing more than a suspicion, a doubtful conjecture, that Vallette had actual notice of the contents of these bonds.

To show that he had constructive notice of their contents two points are relied on:

First. It is contended that "the term *income bonds* itself imported that the income, and consequently the property of the

company, out of which it issued, was pledged or in some way affected thereby." We doubt whether the term "income bond" imports anything more than a bond payable out of income; and we doubt whether the bond of a company, payable out of its income, and without other words importing a pledge of its income or property, would give a lien thereon. But we need not decide these questions, because, even conceding the legal meaning of the term to be such as is contended for, it does not appear to have been so understood in Cincinnati by any one in 1855-6. On the contrary, it was generally regarded, as we have already shown, as importing the non-existence of a lien. Moreover, Vallette's letter of May 8, 1855, shows that he then had knowledge of the mortgage bonds previously issued, and regarded them as giving a lien on the company's property. It was natural for him to suppose that there was a difference between the mortgage bonds and the income bonds; and that as the former gave a lien, the latter did not. We cannot, therefore, decide that his knowledge of the name of these bonds makes him chargeable with constructive notice of their contents.

Secondly. It is contended, that, as Vallette undertook to dispose of the two bonds for Loker, Rennick & Co., it was his duty to examine their contents in order to ascertain their character and value, and that, therefore, he is chargeable with notice of their contents. This argument would, perhaps, not be deemed conclusive, even if Vallette had never heard of the bonds before receiving them from Loker, Rennick & Co., because an agent is only chargeable with constructive notice of those facts which he would have been led to a knowledge of by performing his duty according to the regular course of business. If Vallette had never heard of these bonds before receiving them, it would have been his duty to inquire of persons familiar with them concerning their value and the propriety of disposing of them at their market price; and we doubt whether he would have been bound to do anything more in the way of inquiry. But before receiving them he had formed an opinion, based on the assumption that they gave no lien, concerning their value and the propriety of dis-

posing of them at their market price; and these facts were known to Loker, Rennick & Co., when they sent him the bonds. We are, therefore, of the opinion that he was not bound, as agent, to examine their contents, and that he fully performed his duty by placing them with Hewson & Holmes for sale.

We might perhaps have regarded the proof in this case sufficient to charge Vallette with notice, if it had appeared that he purchased the third mortgage bonds for less than their market value, or that he took them as security for a pre-existing debt, or that he had any other motive for turning away from knowledge of the lien given by the income bonds. But it does not appear that he had such motive. The fact that he could easily have informed himself of the contents of the income bonds, and that he acted incautiously and negligently if he failed to do so, cannot render him liable to the appellants, who were equally incautious and negligent in failing to obtain recorded evidence of their lien.

3. It is contended that Walker, from whom Vallette purchased most of his third mortgage bonds, had notice of the lien of the income, and that Vallette is affected by the notice to Walker. The general rule, that a purchaser without notice is not affected by notice to his vendor, is admitted by counsel; but it is contended that this case does not come within the rule, because Vallette was only a purchaser of the bonds secured by the mortgage; that "the evidence of the debt and the security of the mortgage must not be confounded. As to the one, the subsequent purchaser can get a better title than the party he buys from; as to the other he cannot." This position seems untenable. It is well settled, in equity, with reference to debts secured by mortgage, that the debt is the principal thing and the mortgage a mere incident thereto; that a transfer of the debt passes the mortgager's interest in the mortgaged property; and that his transfer of the mortgage, without the debt, passes nothing. (*Southern vs. Wendover*, 5 *N. Hamp.*, 420; *Wilson vs. Troup*, 2 *Cowan*, 195; *Jackson vs. Bronson*, 19 *John.*, 325.) In equity, therefore, Vallette occupies as favorable a position as if the title conveyed by the third mort-

gage had been transferred to him by deed when he purchased the bonds; and having purchased without notice he is not affected by notice to his vendors.

4. It is contended that Winslow, the trustee under the third mortgage, had notice of the lien given by the income bonds, and that Vallette is affected thereby. We need not decide whether Winslow had such notice or not; nor whether he should be regarded as the agent or trustee for the purchasers of the third mortgage bonds, within the meaning of the rule which charges the principal with notice to his agent and the beneficiary with notice to his trustee; because Winslow's knowledge as to the income bonds had no connection with the third mortgage, but was acquired in 1854, long before the third mortgage was made or contemplated, and consequently cannot affect the bond-holders under that mortgage. (2 *Lead. Eq. Cases*, *Am. Ed.*, 106, 116-117.)

The facts connected with the second and third points above considered were before the court at the time of the original trial, and would have furnished no ground for a new trial if decision upon them had been erroneous, (18 *B. Mon.*, 97-8; 3 *Met. K. R.*, 469-70,) and need not have been considered by us but for the alleged facts, (alleged in argument, not in the pleadings,) that several of the appellants were not parties to the original suit, and consequently that the judgment therein is void as against them; and that others of them were only constructively summoned, and consequently are entitled to a re-trial, under *section 445 of the Code*.

The questions just mentioned we need not decide, because, even conceding that the judgment is void as against some of the appellants, and that others of them were entitled to a re-trial, and that their petitions for a new trial may respectively be treated as petitions to recover money received by Vallette under a void judgment, and as motions for a re-trial; yet as, in our opinion, upon all the facts now presented, and considering them as if there had been no judgment in the case, Vallette is entitled to the money, the petitions of all the appellants were properly dismissed.

The judgment is affirmed.

Gill vs. Givin's Adm'r, &c.

CASE 27—PETITION EQUITY—APRIL 18.

Gill vs. Givin's Adm'r, &c.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

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1. *Section 466 of the Civil Code*, which provides for the sale of slaves and real estate descended or devised to the heirs or devisees of a decedent in an action for the settlement of his estate, where it appears that the personal estate is insufficient for the payment of debts, is limited, so far as it relates to the real estate of infant heirs and devisees, by *section 539 of the Code*.

2. So much of the real estate of an infant heir or devisee, (under the sections, *supra*,) as may be necessary to pay the debts of the ancestor or testator, may be sold in a proceeding to settle the decedent's estate; but if more than is necessary for that purpose be sold, except in the mode prescribed by the Revised Statutes, in *chapter 86*, the judgment ordering the sale, and the sale made thereunder, are void.

3. Where the heirs are adults, such judgment, though erroneous, would not be void.

4. *Quers.* Would an order for the sale of so much of the real estate, descended or devised to an infant, as might be necessary to pay a certain sum adjudged to be due to the decedent's creditors, be void, if erroneous as to the sum adjudged to be due?

KINKEAD & BARR, for appellant, cited *Rev. Stat., chap. 86; Civil Code, sec. 539; 16 B. Mon., 296; 18 Ib., 391; 1 Met., 282.*

J. G. WILSON, on same side.

HAMILTON POPE, for appellees, cited, *12 B. Mon., 602; 4 Dana, 429; 7 B. Mon., 62; 8 B. Mon., 104; 12 Ib., 472; Smith, &c. vs. Hawser, &c., Mss. opin. April, 1860.*

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

This proceeding was instituted by the administrator of A. J. Givin and of E. L. Givin for a settlement of their estates and for a sale of a tract of land which they owned in common and which descended to their infant heirs, for the payment of their debts, it being alleged that their personal estate was insufficient for that purpose. The petition alleged that the land cost the decedents \$2,000. The heirs were made defendants and answered by a guardian *ad litem*. The commissioner to whom the cause was referred reported that the decedents owed joint debts amounting to \$296 and separate debts amounting respectively to \$109 12 and \$192 81, total \$597 13, and that

in his opinion it would be to the interest of all parties to sell the whole tract together; and the court thereupon ordered a sale of it, and Gill purchased it at the price of \$1,775, for which he executed bonds, and the land was conveyed to him by the commissioner. A rule having been issued to compel payment of the bonds, Gill resisted it and asked for a cancellation of them, upon the ground that the order of sale was void. But the rule was made absolute, from which order Gill appealed.

"In an action for the settlement of the estate of a deceased person, if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the slaves and real property, or either, descended or devised to the heirs or devisees, who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts." (*Code, sec. 466.*) This applies to infant as well as adult heirs and devisees. In our opinion if the Givins' heirs had been adults, the judgment ordering a sale of the entire tract, though it might have been erroneous, would not have been void, as the court under, *sec. 466*, would have had jurisdiction over the subject and the parties. But that section, so far as it relates to the real estate of infant heirs and devisees, is limited by *sec. 539* of the Code, which declares "that the provisions of the Revised Statutes, in *chapter 86*, shall regulate the proceedings for the sale of the real property and slaves of infants." Construing these two sections together, as we must do, their meaning is, that the real estate of an infant heir or devisee, or so much thereof as may be necessary to pay the debts of the ancestor or testator, may be sold in a proceeding to settle the decedent's estate, but that so much of it as may not be necessary for that purpose shall not be sold, except in the mode prescribed by the Revised Statutes, in *chap. 86*. That chapter declares, that "before a court shall have jurisdiction to decree a sale of infants' lands" several acts shall be done which were not done in this case. The pleadings show that a sale of the whole tract was not necessary to pay the decedents' debts. The court had no jurisdiction to order a sale of more than was necessary for that purpose. The

judgment, therefore, ordering a sale of the whole tract, is void.

This question does not appear to have been decided or considered in the case of *Smith vs. Colver's adm'r, &c.*, (*Miss. opin.*, 1860,) referred to by appellee's counsel. But in the case of *Barret vs. Churchill*, in reply to an argument similar to the one urged in this case, this court said: "It is undoubtedly true, as suggested by counsel in argument, that the object sought to be accomplished by this proceeding was within the general power and jurisdiction of a court of equity, but it is also true that this general power and jurisdiction were subordinate to the powers of the Legislature, and that the Legislature have thought proper, wisely, as we think, to limit and restrict their exercise, in the manner and to the extent indicated," in *chap. 86*, of the Revised Statutes.

It may be proper to add, in reply to a suggestion of counsel, that, in our opinion, it does not necessarily follow from what we have said, that an order for the sale of so much of the real estate descended or devised to an infant as might be necessary to pay a certain sum, adjudged to be due to the decedent's creditors, would be void if erroneous as to the sum adjudged to be due. But we need not now discuss that question.

The judgment is reversed, and the cause remanded with directions to discharge the rule and quash the bonds executed by the appellant.

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CASE 28—PETITION EQUITY—APRIL 18.

Bardstown & Louisville Railroad Company vs. Metcalfe.

APPEAL FROM THE NELSON CIRCUIT COURT.

1. The effect of *section 33, of the Civil Code*, so far as it relates to trustees, is to enable them to sue, as they could have done before the Code, without joining the

beneficiaries in the action. (3 Met., 509.) But, under the old practice, a trustee, under a mortgage made to secure the payment of money to others, could not sue for a foreclosure and sale without making the *cestuis que trust* parties, (*Story's Eq. Pl.*, sec. 201,) and the Code does not give him the right to do so.

2. Under section 37, of the *Civil Code*, one person may sue for the benefit of others, (1,) where the plaintiff has a common or general interest with many others; (2,) where the persons interested, but not having a common or general interest, are numerous and it is impracticable to bring them all before the court within a reasonable time.

3. A trustee, to whom a mortgage is made by a railroad company for the benefit of bond holders, and who has no interest except as trustee, is not authorized, by section 37, *supra*, to bring an action in his own name for its foreclosure; but, where the mortgage makes it his duty to sue, he may do so, without making the bond holders parties, upon showing that they are numerous, and that it is impracticable to bring them before the court within a reasonable time.

4. In such case, where the suit is properly brought by the trustee, without making the bond holders parties, it is error to give him a judgment for the money. The court should retain control over it for the benefit of those entitled to it.

5. Whether a corporation is public or private depends upon the purposes for which it is formed, and the powers conferred upon it, and not upon the character of its stockholders. It does not alter its character that a corporation, the State, or the United States, own a portion of its stock.

6. The rules of construction which apply to charters delegating sovereign powers to corporations do not depend upon the question whether the corporation is a private or public one, but on the character of the powers conferred, and the purposes of the organization. The power of a railroad or other private corporation to take private property for its use, being a delegation of sovereign power, must be construed as it would be if delegated to a municipal corporation. And the powers of private and public corporations, with respect to their property, are governed by the same principles, and, in the absence of express provisions of law, depend upon the purposes for which the corporation was formed.

7. Generally, a private corporation has an implied power to do whatever may be necessary to execute its express powers, and to accomplish the purposes for which it was formed.

8. A railroad company, authorized by its charter to borrow money on its credit, necessary to complete the road, but not expressly authorized to make a mortgage upon its property or franchises to secure the bonds issued therefor, has an implied power to do so; though it cannot mortgage its corporate existence or any prerogative franchise conferred upon it. But, the right to build and use a railroad is not a prerogative franchise. A purchaser under its mortgage would take the road, subject to the terms of the charter designed to protect the public, and would be bound thereby as fully as the corporation.

9. A mortgage by a railroad company, to secure money borrowed for the construction of its road, is not opposed to the public policy of this State. This is indicated by the general course of legislation here upon the subject.

10. That a railroad company voluntarily mortgaged its property to secure the money which it was expressly authorized by its charter to borrow, and that its bond holders invested their money upon the faith of the mortgage, relieves the case from the operation of the decision in *Vimont vs. Winchester & Lexington Turnpike Company*, (5 B. Mon., 1.) If that decision can be regarded as denying that property or fran-

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chisee, in the use of which the public have an interest, can be assigned, the court would hesitate to follow it in view of other decisions. (4 *Litt.*, 160; 2 *J. J. Mar.*, 227; 1 *Dana*, 261.)

11. The mortgage of a "railroad with all its rights and privileges is authorized under a resolution of its board of directors, which authorized a mortgage of "the road and its property, &c." As there was nothing to which the phrase "&c.," could have been designed to apply, except the franchises, it must be regarded as having been used to embrace them.

12. As to the use of the phrase "&c.," and what it implies, see opinion.

13. An authority to mortgage a railroad and its property must design a transfer of the right to operate the road.

14. In a suit to foreclose a mortgage upon a railroad and its franchises, (which authorized a sale upon failure to pay either the interest or principal, to satisfy the amount claimed and due, but contained no provision that the principal should become due upon failure to pay interest, and the principal is not due,) the bond holders have a right to a sale for the interest due. If the property was divisible, a sale should be ordered of so much as might satisfy the amount due. If not susceptible of division it must be sold or leased as an entirety. (2 *B. Mon.*, 208-9; 5 *Paige*, *C. R.*, 40; 1 *Ala. R. N. S.*, 393.)

15. In such case, where the property is worth much more than the amount of the debt and interest, it should be leased by public auction for the shortest term that will bring the amount due, and the accruing interest and principal as the same shall become due. If no one will take it for a term of years, then to be sold absolutely; the company to elect whether the property should be first offered for a term of years.

16. In such case, the lessee or purchaser to give bonds with good security, personal or real, for the purchase money, including the accruing interest and principal of the mortgage bonds; a lien on the property, or term, to be reserved as additional security. If leased, the lessee to give a covenant, with good security, to keep in good repair the road, cars, and other property, not consumable by use, (such as fuel and oil,) and to return the same to the company at the end of the term in as good condition as when received. The court, before ordering a lease, to cause an inventory to be made of the property, its value, condition, &c., to be filed, and declared in the decree conclusive evidence of its condition and value at the time of the lease.

JNO. E. NEWMAN, for appellant, cited *Civil Code*, secs. 30, 37; *Rev. Stat.*, chap. 24, sec. 1; 4 *Bibb*, 17; 1 *Mar.*, 105, 587; 6 *Dana*, 39; *Redfield on Railways*, 427, 429, 430, 422, note 14, 591, note 23; 2 *Bibb*, 14; 2 *Kent's Com.*, 298; 5 *B. Mon.*, 1; 12 *Ib.*, 79; *Pierce on American Railroad Law*, 512, 515, note 1; 32 *N. H.*, 504; 23 *Howard*, 118.

C. A. WICKLIFFE, on same side.

ELLIOTT & MCKAY, for appellee, cited *Sess. Acts*, 1853-4, page 552; *Redfield on Railways*, 574 to 588, and note 20; *Ib.*, 4 and 5; *Ib.*, 692, 697; *Civil Code*, sec. 33.

JAMES HARLAN and JAMES HARLAN, Jr., on same side, cited 2 *Kent's Com.*, sec. 33; 1 *U. S. Digest*, 589; 5 *B. Mon.*, 1; 3 *Barb.*,

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Ch. Rep., 119; 3 *Wendell*, 13; 2 *Ala.*, (*Stewart*.) 401; 6 *Gill & Johnson*, 205; 11 *Vermont*, 385; 12 *N. Hamp.*, 431; 4 *Arkansas*, 304; 4 *Humphreys*, 403; 9 *Watts & Sergeant*, 27; 5 *lb.*, 223; 2 *Wheaton*, 373; 23 *Howard*, 400.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The appellant's board of directors was authorized by its charter to borrow, on its credit, a sum not exceeding \$50,000. The board authorized its president to borrow \$30,000, and, as security therefor, to execute a mortgage "upon the road and its property, &c." The president executed a mortgage to the appellee, Metcalfe, as trustee, upon "the said railroad with all its rights and privileges" to secure its bonds for said \$30,000. The bonds were dated January 1, 1860, and payable ten years after date, with interest payable semi-annually.

In September, 1860, Metcalfe, as trustee, filed a petition alleging that said bonds had been "sold to divers persons," and that the appellant had failed to pay the interest due July 1, 1860, and by amended petitions, the last of which was filed at the March term, 1862, he alleged that three other instalments of interest were due and unpaid. At the same term the court rendered a judgment that Metcalfe recover of the appellant the interest then due, (\$3,600,) that the mortgage be foreclosed, and that the mortgaged property be leased to the highest bidder for a term of eight years from January 1, 1862, to pay to Metcalfe said sum, and also the interest thereafter to accrue and the principal when the same should become due; and if no one would lease the property on those terms, then that it be sold to the highest bidder to pay said principal and interest, and that for any surplus it might bring the commissioner should take bonds to himself for the benefit of those concerned. From that judgment this appeal was taken.

1. A demurrer to the petition, because the bond holders were not parties to the suit, was overruled, and presents the first question to be considered.

It is contended that Metcalfe had a right to sue, without making the bond holders parties, under *sec. 33 of the Code*, which declares that "an executor, administrator, guar-

dian, trustee of an express trust," and other fiduciaries therein mentioned, "may bring an action in his own name without joining with him the person for whose benefit it is prosecuted."

In the case of *Anderson vs. Watson*, (3 Met. Ky. Rep., 509,) it was held that a guardian cannot sue in his own name for personal property of his ward unlawfully detained by another, and the court said: "The guardian can, and could before the Code, sue in his own name upon a note taken by him for money of his ward. Under the 30th section of the Code, declaring that every action must be prosecuted in the name of the real party in interest, except as provided in section 33, it might have been necessary to sue in the infant's name upon such a note, but for the provision in section 33 relating to guardians. In our opinion, the effect of section 33, so far as it relates to guardians, is to enable them to sue as they could have done before the Code, without joining the wards in the action." This reasoning applies to the provisions of section 33 concerning trustees. Under the old practice a trustee could sue at law for property to which he held the legal title. Section 30 might have made it necessary to bring such a suit in the name of the beneficiary, but for the provision in section 33. So, under the old practice, the trustee might sue in equity without making the *cestui que trust* a party, in cases where the trustee was entitled to receive and hold the money or property for the benefit of the *cestui que trust*. (*Calvert on Parties*, 212-15.) This rule might have been changed by section 30, but for the provision in section 33. But under the old practice a trustee, under a mortgage made to secure the payment of money to others, could not sue for a foreclosure and sale without making the *cestuis que trust* parties. (*Story's Eq. Pl.*, sec. 201.) And, in our opinion, the framers of the Code did not intend to give such right to such a trustee. The cases of *McClanahan vs. Beasty*, (17 B. Mon., 111,) and *Newport vs. Taylor's heirs*, (16 B. Mon., 781,) are cases in which the trustee could have sued under the old practice without making the beneficiaries parties. But Metcalfe has no right to receive either the principal or interest of the mortgage bonds, payment of which he seeks to

enforce. The bond holders were therefore necessary parties to the suit, unless, as is also contended, Metcalfe had a right to maintain the action under *section 37 of the Code*, which declares that, "where the question is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all."

Here are two distinct grounds upon either of which one person may sue for the benefit of others, viz: 1, where the plaintiff has a common or general interest with many others; 2, where the persons interested, but not having a common or general interest, are numerous and it is impracticable to bring them all before the court within a reasonable time.

Metcalfe's right to bring this action cannot be maintained upon the first ground, 1, because he sued as trustee and not as bond holder, and there is no common or general interest between the trustee and bond holders; 2, because he failed to state the number of bond holders, or even to allege that there are many of them. Nor can it be maintained upon the second ground, because he has failed to allege or otherwise to show that the bond holders are numerous and that it is impracticable to bring them all before the court within a reasonable time. We do not suppose that the framers of the Code meant to authorize a person having no interest in a suit, nor any duty to perform concerning it, to sue for the benefit of the persons interested, however numerous they may be. And if Metcalfe had been a naked trustee, with no duty to perform except to hold the legal title for the benefit of the bond holders, we doubt whether he could have maintained the action, however numerous he might have shown them to be. But the mortgage declares that, "upon failure of said company to pay the interest or principal of said bonds when due and demanded, the said trustee shall proceed by due course of law to subject the said railroad and all its effects to sale to satisfy the amount claimed and due." In our opinion, as the deed made it the duty of Metcalfe to sue for a sale of the road, he might have

maintained the action if he had shown that the bond holders were numerous, and that it was impracticable to bring them before the court withing a reasonable time. But as he failed to do so, the demurrer for a defect of parties should have been sustained.

2. Even if he had shown himself entitled to maintain the action, without making the bond holders parties, it would have been erroneous to give him a judgment for the money. The court should have retained control over it for the benefit of those entitled to it.

As the errors above mentioned may be corrected upon the return of the cause, it is proper that we should consider several other alleged errors in the judgment and other proceedings of the court below.

3. It is contended that the court erred in refusing to permit the appellant to file an amended answer, offered at the March term, 1862.

The only ground of defense presented by that answer is, that under the charter of the appellant the town of Bardstown and three districts of Nelson county were authorized to take, and did take and yet hold, a part of its stock. It is argued that those corporations, by becoming stockholders of the appellant, converted it into a public corporation; and, therefore, that, in deciding what are its powers, we must adopt those strict rules of construction which apply to charters delegating sovereign powers to public corporations. That position is not considered tenable. The character of a corporation depends upon the purposes for which it is formed and the powers conferred upon it, and not upon the character of its stockholders. "It does not alter the character of a corporation, that the State or the United States own a portion of its stock." (*Redfield on Railways*, page 6, and cases cited.)

Nor does the principle of construction contended for as applicable to this case depend upon the question whether the corporation is a private or public one. It depends on the character of the powers conferred and the purposes of the organization. The power of a railroad or other private corporation to take private property for its use, being a delegation of sov-

ereign power, must be construed as it would be if delegated to a municipal corporation; whilst the powers of private and public corporations, with respect to their property, are governed by the same principles and, in the absence of express provisions of law, depend upon the purposes for which the corporation was formed. As the answer presented no fact material to the defense, the motion to file it was properly overruled.

4. It is contended, that the appellant had no power to mortgage its road or franchises. This question, and the next one that we shall consider, were raised by a general demurrer to the petition.

Generally, a private corporation has an implied power to do whatever may be necessary to execute its express powers and to accomplish the purposes for which it was formed. The appellant was expressly authorized to borrow this money, but was not expressly authorized to make a mortgage. Had it not an implied power to do so? It cannot be doubted that a manufacturing corporation having power, express or implied, to borrow money might, unless expressly prohibited, mortgage its property to secure the debt. But it is contended that a railroad corporation stands upon a different footing, because its road is built for public use as well as for the profit of its stockholders; that it is under a duty to the public to keep its road in repair and carry on its business for the transportation of freight and passengers; and that it cannot relieve itself from those duties by conveying its road away.

These views seem to be sustained by several English decisions. At any rate, it seems to be settled in England that a railway company cannot, without express authority from Parliament, assign or mortgage or lease its road, upon the ground that it is against public policy. An examination of several of those cases does not enable us to state the precise views of public policy out of which that doctrine sprung. It probably arose in part out of a general statute which is not in force here. Judge Redfield, however says: "The ground upon which the decisions in England and America, which hold the franchises of corporations not to be assignable, except by con-

sent of the Legislature, rest, is mainly the same as that upon which it has been held in this country, that such franchises are beyond the legislative control, namely, that the charter constitutes a contract between the sovereignty and the corporation on the one part for the grant of certain privileges and immunities, and, upon the other, for the performance of certain duties and functions which are deemed an equivalent or consideration.

* * The state confers upon railways some of its most essential powers of sovereignty, that of eminent domain, and of a virtual monopoly, in the transportation of freight and passengers, and in return therefor, stipulates for the performance of those duties by the corporation. The corporation have no more right in equity and justice to transfer their obligations to other companies, or to natural persons, than the State has to withdraw them altogether." (*Redfield on R.*, p. 422, note 14.)

The doctrine, according to Judge Redfield, rests upon the ground that the corporation is under an obligation to the state to build and operate its road. Such was formerly the rule in England, even as to a railway corporation that had not made an express undertaking to that effect and to which no exclusive privileges had been granted. (*Redfield on R.*, sec. 192.) But concerning that class of cases, the doctrine seems to have been overruled in England, and has never prevailed in America. (*Id.* sec. 192; and notes.) The appellant did not expressly undertake to build the road authorized by its charter; nor did its charter expressly declare that it should do so; nor was any exclusive right to do so conferred upon it. In our opinion the appellant was not bound to commence the road, nor to complete it after commencing, nor to put it in operation after completion, nor to continue it in operation. It might have forfeited its charter by *non user*, but was not bound to use it. So long as it shall avail itself of the privileges conferred by its charter it will be liable to the burthens thereby imposed. But in our opinion neither the public, nor any individual not connected with it, can compel it to exercise its corporate franchises or make it pay damages for failing to do so. The doctrine under consideration has, therefore, no foundation in this case, if the ground on which it rests is earnestly stated

by Judge Redfield. Nor do we perceive any other solid ground on which to place it.

We do not suppose that the appellant could mortgage its corporate existence, or any prerogative franchise conferred upon it. But the right to build and use a railroad is not a prerogative franchise. It has indeed been said that "both currency and internal communication between different portions of the state are exclusively the prerogatives of sovereignty;" (*Redfield on R.*, p. 23;) and that "the right to build and use a railroad and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the Legislature." (*Id.*, p. 23, note 1.) Possibly these passages were not designed to mean more than this: a road cannot be made over the lands of unwilling proprietors except under authority from the State; and the State, in order to encourage internal improvements, may grant to a corporation or individual the exclusive right to build a road between two points. In the absence of any positive law upon the subject our opinion is, that an individual has as much right to build a railroad over his own land or the land of others, with their consent, as he has to build a stage or a wagon, and as much right to use the former as the latter in carrying freight and passengers for pay.

The denial of the right of a railroad corporation to transfer its road has sometimes been based upon considerations of general convenience and public interest, and upon the ground that the corporation having been chosen by the Legislature as the fit depositary of the right to construct and operate the road, should not be permitted to transfer it to irresponsible parties. To this argument several objections present themselves. The appellant's directors, in authorizing this mortgage to Metcalfe, declared themselves "satisfied that, to furnish and complete the road, they will require the sum of \$30,000 in addition to the means at their command." Assuming, as we must do, that the loan was necessary to complete the road, and assuming it to be probable, as we may do, that the loan could not have been effected without a mortgage, considerations of general conven-

ience seem to be on the side of the power to make the mortgage rather than against it.

The public had an interest in seeing the road constructed and operated according to the terms of the charter. But whether it shall be thus operated by A or B, by an individual or a corporation, does not seem to be a matter of any interest whatever to the public. Under the charter of the appellant its road, whilst held by it, is under the control of its stockholders. A single person, by purchasing all the stock, can control the road as completely as if he owned it individually. A purchaser under its mortgage would take the road subject to the terms of the charter designed to protect the public, and would be bound thereby as fully as the corporation is.

We perceive no reason to suppose that a purchaser of all the property of appellant would be less responsible, in a pecuniary point of view, than the appellant. Nor do we perceive any other reason to suppose that the individual responsibility of the purchaser would not be quite as beneficial to the public as the corporate responsibility of the appellant. General convenience requires that the appellant shall in some manner be compelled to pay the money it borrowed. But it is contended that this should be done by merely subjecting the accruing profits. To do that effectually it might be necessary to appoint a receiver to take charge of the road, because under the management of the directors it is possible that no profits might accrue, whilst under a different management the road might be profitable. Yet every argument against allowing the appellant to mortgage its road applies with equal force against the appointment of a receiver to control it, with perhaps the additional argument that a receiver would not be personally liable, like a purchaser, as a common carrier.

That a mortgage by a railway company to secure money borrowed for the construction of its road is not opposed to the public policy of this State, is indicated by the general course of legislation upon the subject. We believe that all the railroads in the State, except that of the appellant, were constructed under charters authorizing such mortgages; and mortgages made by the Covington and Lexington Company, and

by the Lexington and Big Sandy Company, without express authority either to make a mortgage or to borrow money, were afterward ratified by the Legislature. And we are not aware of an instance in which the Legislature, when applied to, has refused to confer such power or to ratify the exercise of it.

The facts, that the appellant voluntarily mortgaged its property to secure the money which it was expressly authorized to borrow, and that the bond holders invested their money upon the faith of the mortgage, furnish, in our opinion, a sufficient distinction to relieve this case from the operation of the decision in the case of *Vimont vs. the Winchester & Lexington Turnpike Co.*, (5 B. Mon., 1.) in which it was held that a turnpike road could not be sold for a general debt of the corporation. If the decision in that case could be regarded as denying that property or franchises, in the use of which the public have an interest, can be assigned, we might perhaps hesitate to follow it, in view of several other decisions of this court. In *Jouett vs. Lewis*, (4 Litt., 160,) the vendee of a turnpike road was held liable upon his covenant to keep it in repair without any question being made as to the validity of the sale. In the *Trustees of Maysville vs. Boone*, (2 J. J. Mar., 227,) a ferry franchise was held to be alienable. And in *McCauley vs. Givens*, (1 Dana, 261,) a lease of a ferry under an order of court was held to be valid. Our decision rests upon the ground that the appellant, having been authorized to borrow this money, had implied power to execute a mortgage to secure its payment. The American decisions, cited in *Peirce on Railroad Law*, chap. 20, and *Redfield on Railways*, sec. 235, note 19, present such a conflict of opinion that we have felt free to consider the question as an open one, and have not deemed it advisable to attempt to sustain our opinion by referring to cases which are perhaps counter-balanced by opposing authorities.

5. It is contended that the mortgage of the "railroad with all its rights and privileges" was not authorized by the resolution of the directors, which authorized a mortgage of "the road and its property, &c."

Lord Coke, in speaking of &c., as used by Littleton, says that "it doth imply some other necessary matter." (*Com.* 17 a.) In our opinion, the directors must be regarded as having used it for some purpose. Perhaps no effect could have been given to it if there had been several matters, to either one of which it might possibly have been designed to apply. But the appellant held nothing except its road and other property and its franchises. There was nothing to which the phrase &c. could have been designed to apply except the franchises, and we therefore regard it as having been used to embrace them.

Moreover, as the object was to secure the mortgage debt, and as the road would be of little or no value without the right to use it as a railroad, our opinion is that the directors, in authorizing a mortgage of the road and its property, must have designed a transfer of the right to operate the road.

6. It is contended that, though the mortgage is valid, no sale should be ordered until the principal of the bonds shall fall due. In discussing the first question above considered we recited the condition of the mortgage concerning the sale of the property. It authorizes a sale, upon the failure to pay either the interest or principal, "to satisfy the amount claimed and due." There is no provision that the principal shall become due upon a failure to pay interest. The principal is not due, and until it shall become due, the appellant will have no right to pay it, and the bond holders can have no right to insist on payment of it by foreclosure or otherwise. But they have a right to a sale for the interest due. If the property was divisible it would be proper to order a sale of only so much as might satisfy the amount due. But it is not susceptible of division, and must therefore be sold or leased as an entirety. (*Cauffman vs. Sayre*, 2 B. Mon., 208-9; *Bank of Ogdensburg vs. Arnold*, 5 Paige's C. R., 40; *Walker vs. Hullett*, 1 Ala. R. N. S., 393.) As it seems probable that the property is worth much more than the amount of the debt and interest, our opinion is, that, if the appellant prefers that course to be taken, the property should be leased by public auction, for the shortest term that will bring the amount due and the accruing interest and principal, as the same shall become due. If no one will take it for a

term of years, then it should be sold absolutely. The appellant should have an opportunity to elect whether or not the property shall be offered in the first instance for a term of years. The lessee or purchaser should be required to give bonds with good security, personal or real, to be approved by the court, for the purchase money, including the accruing interest and principal of the mortgage bonds, and a lien on the property or term should be reserved as additional security.

If the property should be leased, the lessee should be required to give a covenant, with good security, to be approved by the court, to keep in good repair the road, cars, and other property not consumable by use, such as fuel and oil, and to return the same to the appellant, at the end of the term, in as good condition as it may be in when received; and to prevent future controversy with reference thereto, the court, before ordering a lease, should cause an inventory to be made, by one or more commissioners, of said property, its value, condition, &c., which should be filed in the cause and be declared in the decree, ordering the lease, to be conclusive evidence of the condition and value of said property at the time of the lease.

We need not consider the question made by appellant's counsel as to the failure of the appellee to show that the mortgage was under the seal of the corporation, as the appellant, by an entry of record in this court, has waived the error, if any, with reference thereto.

The judgment is *reversed*, and the cause remanded for further proceedings, not inconsistent with this opinion.

CASE 29—PETITION EQUITY—APRIL 23.

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Millet &c. vs. Pottinger &c.

APPEALS FROM THE DAVIESS CIRCUIT COURT.

1. The right of an attaching creditor, (under the act of 1796 to prevent fraudulent sales and conveyances,) to set aside a sale which is merely fraudulent and colorable, and to subject to the payment of his debt the property and effects of the fraudulent vendor, is not taken away or impaired by the act of 1856 to prevent preferences among creditors in contemplation of insolvency. The former act was not repealed by the latter; they embrace distinct classes of cases, and provide appropriate remedies for each.

2. The act of 1856, *supra*, does not prohibit, or afford a remedy for, sales or assignments that are merely fraudulent, although it prohibits the preference which the act of 1796 allowed.

3. To maintain the right conferred upon creditors by the act of 1856, *supra*, it is indispensable to show: *first*, that the sale, mortgage or assignment was made "in contemplation of insolvency," and, *second*, that it was made by the debtor "with the design to prefer one or more creditors, to the exclusion in whole or in part of others." The absence of either of these essentials is fatal to the claim of the party seeking the benefit of the act, however *fraudulent* the transaction may be.

KINCHLOE & JENNINGS, for appellants.

W. N. SWEENEY, on same side.

O. F. STIRMAN, for appellees, cited *Act of 1856, Session acts 1855-6, page 107; 1 Met., 450.*

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

Millet filed his petition on the 30th December, 1857, against William and James Pottinger, who were merchants, doing business at Owensboro and at Mount Dalley in Daviess county, to recover the amount of two bills of exchange on which the firm were bound. The plaintiff at the same time sued out an attachment against the defendants, on the ground set forth in his petition and affidavit, that the defendants had, for the fraudulent purpose and with the fraudulent intent of cheating, hindering, and delaying their creditors in the collection of their debts, sold their stock of goods &c. at the two establishments mentioned, to their younger brother Frank H. Pottinger.

A number of other creditors brought their suits against the firm and sued out attachments on the same ground.

After the several attachments had been levied on the goods and effects of the defendants, Low & Whitney and Curd & White filed their petition on the 27th January, 1858, alleging that the firm of Pottinger & Brother had on the 5th September, 1857, in contemplation of their insolvency, and with the design of preferring one of their creditors to the exclusion of all the rest, sold and transferred all their goods and effects to the said F. H. Pottinger.

The several suits were consolidated, and on final hearing the court below rendered a judgment directing a distribution of the fund arising from the sale of the effects of the firm and from the collection of debts due them, among all their creditors, *pro rata*, according to the act of March, 1856, to prevent fraudulent assignments in trust for creditors &c. (1 *Rev. Stat.* 533.) From that judgment the attaching creditors have appealed.

From the evidence in the record it is perfectly clear that the pretended sale by this firm to their brother was the result of a fraudulent combination and arrangement, the only object and design of which was to place their property beyond the reach of their creditors; and that this design was well understood and concurred in by all the parties concerned. It is insisted that R. L. Pottinger, the father of the members of the firm, had *bona fide* claims against them which it was the object of the parties to secure. Such, it is true, was the form which the transactions were made to assume, but it was a mere form without substance.

As first stated the sale was pretended and colorable merely, and the notes given by the pretended purchaser, and which, as is claimed, were assigned to the father as a security for his debts and liabilities, were never intended to be inforceable or obligatory. There could have been no design or intention therefore to prefer R. L. Pottinger, conceding that he was a *bona fide* creditor, by securing his debts or liabilities. The notes partook equally of the fictitious and fraudulent character of the entire transaction, none of the parties to which intended

that they should impose any liability on the pretended maker, or that they were to afford any security to the pretended assignor. These deductions are so conclusively sustained by all the facts and circumstances proved in the case, that it is deemed unnecessary to advert to them specially.

In view of this state of fact, the right of the attaching creditors under the act of 1796 to set aside the fraudulent sale, and to subject to the payment of their debts, the property and effects of the fraudulent vendors, is unquestionable. That act was not repealed, nor are the rights of creditors under it, taken away or impaired, by the acts of 1856 just referred to. The two statutes embrace distinct classes of cases and provide appropriate remedies for each.

The former act was intended to prevent *fraudulent* sales and conveyances, but it allowed, as has been often decided, a debtor to prefer by sale, mortgage or assignment, any one or more of his creditors. The latter act does not prohibit, or afford a remedy for sales or assignments that are *merely* fraudulent, but it does prohibit the preference which the former act allowed.

To maintain the right conferred upon creditors by the act of 1856, it is indispensable to show, *first*, that the sale, mortgage, or assignment was made "in contemplation of insolvency," and *second*, that it was made by the debtor "with the *design* to prefer one or more creditors, to the exclusion in whole or in part of others." The absence of either one of these essentials is fatal to the claim of the party seeking the benefit of the act. However *fraudulent* the transaction may be, unless accompanied by the motive or *design* to prefer a creditor, it does not operate as an assignment and transfer of the property of the debtor, inuring to the benefit of all his creditors.

Inasmuch as there was no such design proved in the present case, it results that the judgment complained of was erroneous, and prejudicial to the appellants, who were clearly entitled to the fund in contest according to their respective priorities.

The judgment is therefore reversed, and the cause remanded for a judgment and further proceedings not inconsistent with this opinion.

CASE 30—PETITION EQUITY—APRIL 23.

Duncan vs. Prentice.

* APPEAL FROM THE NELSON CIRCUIT COURT.

1. Devise of land to one for life, remainder to another upon condition that the latter pay to a third person a certain sum. If the testator intended that the money should be paid after the termination of the life estate, the remainder vested immediately after the testator's death, and the condition as to the payment of the legacy was a subsequent and not a precedent condition. (5 *Pick.*, 534; 9 *Watte*, 60; 2 *Conn.* 201; 6 *Gill & John.*, 507; 3 *Peters*, 346.)

2. In the case *supra* it does not appear what was the age of the devisee of the life estate, nor what was the value of the land; nor is there any fact conducing to show what was the testator's intention as to the time when the legacy should be paid, except the provisions of the will. *Held*, That the legacy was not payable until the termination of the life estate. (5 *Gill & John.*, 507.)

3. The payment by the devisee of the remainder, of a part of the legacy, before the termination of the life estate, was an acceptance of the devise of the remainder. Having accepted the devise he must pay the legacy. (6 *Paige*, 383.) But the voluntary payment of part of it, when it was not due, does not render him liable for the residue during the existence of the life-estate.

4. A *feme covert*, having a vested right to a legacy, not due, her husband, upon her death, is equitably entitled thereto. (6 *Gill & John.*, 507.) And, there being no demands against her estate, he may recover it from her administrator when due.

JAMES HARLAN & JAMES HARLAN, Jr., for appellant.

WM. R. GRIGSBY, for appellee, cited 4 *Littell*, 348.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Charles Duncan, who died in 1853, devised land to his mother for life, remainder to his brother, James C. Duncan, "upon the condition that he pay to my sister, Sarah A. Duncan, one thousand dollars." Sarah A. Duncan married the appellee, Prentice. In 1856 James C. Duncan paid \$500 to Prentice and wife, for which they gave a receipt stating that the money was in part payment of the said bequest of \$1,000. Mrs. Prentice died in 1857, and James C. Duncan was appointed her administrator. The devisee of the life estate is living. Prentice brought this suit against James C. Duncan for the residue of said \$1,000. The pleadings show that Mrs. Prentice owed no debts at the time of her death. The defendant filed an answer denying that he has accepted the de-

vise to him, and contending that he is not bound to pay the \$500 until the remainder shall come into his possession, and that then the heirs, and not the husband of Mrs. Prentice, will be entitled thereto. The court below gave a judgment against the defendant for the \$500, from which he appeals.

If, as the appellant contends, the testator intended that the \$1,000 should be paid after the termination of the life-estate devised to his mother, then it seems clear that the remainder vested immediately after the testator's death, and that the condition as to the payment of the legacy was a subsequent and not a precedent condition. (*Huyden vs. Sloughton*, 5 Pick., 534; *Downer vs. Downer*, 9 Walls, 60; *Wheeler vs. Walker*, 2 Conn., 201; *Spence vs. Robbins*, 6 Gill & John., 507; *Finlay, &c. vs. King's lessee*, 3 Peters, 346.)

It does not appear what was the age of the devisee of the life-estate, nor what was the value of the land, nor is there any fact conducing to show what was the testator's intention, as to the time when the legacy should be paid, except the provisions of the will previously stated. In our opinion the most reasonable inference is, that the testator did not intend to require payment of the legacy until the termination of the life-estate. In this we are sustained by the case of *Spence vs. Robbins*, above cited, which is the only direct authority that we have found upon the subject.

Whether or not a court of equity would have charged the remainder with the legacy, if the devisee of the remainder had refused to accept the devise, we need not decide, because, in our opinion, the payment of the \$500 proves that he accepted the devise. Having accepted the devise he must pay the legacy. (*Spofford vs. Manning*, 6 Paige, 383.) But his voluntary payment of part of it, when it was not due, does not render him liable for the residue during the existence of the life-estate.

Mrs. Prentice had a vested right to the legacy, and upon her death her husband became equitably entitled thereto. (*Spence vs. Robbins*, *supra*.) And as there are no demands against her estate he would have been entitled to recover the money from

Duncan vs. Prentice.

her administrator if it had been due. But the suit was premature.

The judgment is reversed, and the cause remanded with directions to dismiss the petition without prejudice.

DECISIONS
OF
THE COURT OF APPEALS
OF KENTUCKY.

SUMMER TERM, 1863.

CASE 1—FORFEITED RECOGNIZANCE—JUNE 3.

Commonwealth vs. Roberts.

APPEAL FROM THE HENRY CIRCUIT COURT.

1. A recognizance, entered into in October, 1860, was filed in the clerk's office in December, 1860. The case was before the grand jury at the term to which the defendant was recognized, who reported to the court that they had failed to indict; but the court failed to enter of record the discharge of the defendant and the exoneration of the bail. (*Crim. Code, sec. 116.*) In September, 1862, (no indictment in the meantime having been found, nor any other step taken towards the prosecution of the charge,) proceedings were taken to forfeit the recognizance. *Held*, That the circuit court properly dismissed the proceeding, the effect of which was to exonerate all the parties from liability on the recognizance—an order which, under the section *supra*, should have been made upon the failure of the grand jury to indict.

A. J. JAMES, Attorney General, for Commonwealth, cited 2 *Met.*, 387.

CHIEF JUSTICE DUVAL DELIVERED THE OPINION OF THE COURT:

Admitting that the answer of the defendants was technically defective, and that the objection of the Commonwealth to some of the evidence offered, should have been sustained, still the question arises whether, upon the whole record, any substantial injustice has been done the Commonwealth by the judgment appealed from.

The recognizance appears to have been entered into in October, 1860, and filed in the clerk's office in December, 1860. From that day to this, so far as the record shows, no indictment has ever been found against Roberts, nor any other step taken towards the prosecution of the charge mentioned in the recognizance. The presumption is, that the charge was submitted to the grand jury of the county at the term of the court to which the defendant was recognized, being the April term, 1861. It was, moreover, proved without objection, that the case was before the grand jury at that term, that they failed to find an indictment, and that that fact was reported by them to the court. In addition to this it was admitted on the trial that no indictment was found.

By *section 116 of the Criminal Code*, "unless an indictment be found at the term of the court next after the first submission of the charge to the grand jury, the defendant shall be discharged from custody, or exonerated from bail, unless, for cause shown, the court shall otherwise direct."

It was then the duty of the court, on the report of the grand jury, to have entered of record the discharge of the defendant and the exoneration of the bail, unless there had existed some reason for directing otherwise. This, however, appears not to have been done. But certainly that omission should not be allowed to prejudice the defendant and his sureties to the extent of subjecting them to liability for the whole amount of the bail. In September, 1862, nearly two years after the date of the recognizance, and no indictment having in the meantime been found, this summons is issued against the defendant and his sureties, requiring them to show cause why the recognizance should not be forfeited, &c. In our opinion the facts referred to constituted sufficient cause, and for that reason the

court below properly dismissed the proceeding, the effect of which was to exonerate all the parties from liability on the recognizance—an order which, under the section quoted, should have been made, as already shown, upon the failure of the grand jury to indict.

The errors in the proceeding are not prejudicial to the appellant, and therefore furnish no ground of reversal.

The judgment is affirmed.

CASE 2—FORFEITED RECOGNIZANCE—JUNE 4.

Brown vs. Commonwealth.

APPEAL FROM THE JEFFERSON CIRCUIT COURT.

1. In an action upon a forfeited recognizance the defendant must make a written statement of the facts constituting his defense. Without this the mere exhibition to the court of the evidence relied on by him, either to defeat or suspend the action, will be disregarded.

2. In such case the production of the respite of the Governor, not relied on by pleading, constitutes no defense to the action. The court is not authorized to take any judicial notice of the paper presented in that way.

3. That the Governor remits, not the forfeiture, but the judgment itself except as to "fees and costs," furnished no ground for setting aside the judgment so in part omitted.

JEFF. BROWN, for appellant, cited *Crim. Code*, secs. 91, 92; *Rev. Stat.*, chap. 63, art. 3, secs. 9 and 10.

A. J. JAMES, Attorney General, for Commonwealth, cited *Crim. Code*, sec. 343; 14 *B. Mon.*, 392.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

The summons requiring the defendant to show cause why the Commonwealth should not have judgment for the amount of the forfeited recognizance was regularly executed on Brown, who failed to answer, or to "show cause" in any available

mode or form why the forfeiture should not be enforced. The record shows, it is true, that, on the calling of the cause, he *produced* the respite of the Governor, but certainly the mere *production* of that paper constituted no defense to the action. The court was not bound, or even authorized, to take any judicial notice of the paper presented in that way. The statute dispenses with pleadings on the part of the Commonwealth in this class of cases, but in all other respects the action must "proceed as an ordinary civil action," and of course the rule which requires a written statement by the defendant, of the facts constituting his defense, is just as applicable to this as to any other kind of action. Without such written statement, the mere exhibition to the court of the evidence relied on, by the defendant, either to defeat or suspend the action, was properly disregarded, and the court did not err in rendering the judgment.

Nor did the court err in refusing to set aside the judgment. The affidavit and exhibits filed with it are not made part of the record by bill of exceptions or otherwise, but if they were they disclose no valid reason for disturbing the judgment. It appears distinctly that the Governor remitted, not the forfeiture, but the judgment itself, except as to "fees and costs," and certainly the remission furnished no ground for setting aside the judgment so in part remitted.

The judgment is therefore affirmed.

CASE 3—INDICTMENT—JUNE 4.

Commonwealth vs. Graddy.

APPEAL FROM THE MARSHALL CIRCUIT COURT.

1. The summoning of bystanders to serve as grand jurors, when properly ordered, is a duty in the performance of which the accused in a criminal case is entitled to the services of the sheriff, or coroner where there is no sheriff. If summoned by one specially appointed by the court, the indictment may be quashed. It is a substantial error. (*Crim. Code, secs. 159, 98; Rev. Stat., chap. 55; act of March 17, 1862, sess. acts, 95.*)

2. Section 194 of the Criminal Code, which authorizes the court, for sufficient cause, to designate some other officer or person to summon jurors, relates only to petit jurors.

3. Where the grand jury is composed of jurors selected by commissioners, as directed by the Revised Statutes, the court say they incline to the opinion that the summoning of them by a person other than the sheriff or coroner would not be "a substantial error."

A. J. JAMES, Attorney General, for Commonwealth, cited *Crim. Code, sec. 194; Act March 17, 1862, Gen. Laws, 95; 2 Rev. Stat., 348; Ib., 75-6; Whurton's Amer. Crim. Law, sec. 472.*

J. C. GILBERT, for appellee, cited *Crim. Code, secs. 159, 160; 2 Rev. Stat., 75, sec. 2; Ib., 81, sec. 11; Act of March 17, 1862.*

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

An indictment against Graddy, for a felony, was, upon his motion, quashed by the circuit court, because the grand jury, by which it was found, was summoned by one Darnall, acting under the following order of the circuit court: "Ordered that A. A. Nelson be appointed to act as sheriff in summoning jurors and attending upon the court, who, with leave of court, appointed Philip Darnall his special deputy." From the judgment quashing the indictment the Commonwealth appealed.

One of the grounds for setting aside an indictment is, "a substantial error in the summoning or formation of the grand jury." (*Crim. Code, sec. 159.*) In our opinion there was a substantial error in the summoning of the jury in this case.

"The selecting, summoning and impannelling of a grand jury shall be as prescribed by the Revised Statutes." (*Crim. Code, sec. 98.*) Chapter 55 of the *Revised Statutes* declares that "there shall be summoned, by the sheriff of the county, sixteen grand jurymen," &c., and that they shall be selected by the jury-commissioners; but by-standers may be summoned if the commissioners fail to make the selection, or the list is lost or destroyed, or the panel is set aside, or the regular jury discharged, or if any of the jurors fail to attend or are excused. And an act, approved March 17, 1862, (*Sess. Acts, 95.*) authorizes the coroner to summon grand and petit jurors in counties where there is no sheriff.

If the record had shown that the jury in this case was composed of jurors selected by commissioners as directed by the Revised Statutes, we incline to the opinion that the summoning of them by a person other than the sheriff or coroner would not have been "a substantial error."

But they were summoned under an order "that the sheriff cause to be summoned sixteen good and lawful men to act as grand jurors at this term of the court," and a subsequent order states that, "the sheriff returned into court the following list of names as persons summoned to act as grand jurors." In our opinion it must be assumed, that the jury was composed of by-standers.

As the court ordered bystanders to be summoned, it may, perhaps, be presumed that there were proper grounds for doing so. But the summoning of bystanders to serve as jurors was a duty in the performance of which the accused, in our opinion, was entitled to the services of the sheriff or coroner.

Section 194 of the *Criminal Code*, declaring that "the court may, for sufficient cause, designate some other officer or person than the sheriff to summon jurors," does not apply to this case, as it relates only to petit jurors.

In our opinion the court had no authority to appoint a sheriff, or to authorize any person to summon grand jurors. They should have been summoned by the sheriff, or, if there was no sheriff in the county, by the coroner.

The judgment is affirmed.

CASE 4—FORFEITED RECOGNIZANCE—JUNE 5.

Commonwealth vs. Rowland, &c..

APPEAL FROM THE LYON CIRCUIT COURT.

1. The power of the circuit court to remit, in whole or in part, the penalty of a forfeited recognizance, is derived solely from section 94 of the Criminal Code, and is a judicial, not an arbitrary discretion, to be exercised upon consideration of the facts relied upon in the defense. (1 *Met.*, 383.)

2. The fact that the defendant had been either *surrendered* or *arrested* must be alleged and shown in the defense, and is indispensable to the exercise of the discretion allowed by section 94, *supra*. And, *quere*, what additional fact or facts (if any) will be necessary to justify a remission in whole or in part of the penalty?

E. P. CAMPBELL, for Commonwealth, cited 3 *B. Mon.*, 349; 353; 1 *Met.*, 383.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

Rowland, being in custody on a charge of felony, entered into a recognizance, with Lady and others as his sureties, in the sum of three hundred and fifty dollars, for his appearance at the next term of the Lyon circuit court. Having failed to appear, the bond was declared forfeited, and a summons awarded requiring the defendants to show cause why judgment should not be rendered against them for the sum specified.

The defendants answered, alleging, in substance, that, at the time stipulated in the bond for his appearance, he was held and detained by authority of the government of the United States, as a prisoner, at Camp Morton, in the State of Indiana, and was therefore unable to appear and answer said charge, in compliance with the terms of his bond.

A demurrer to this response having been overruled, the court below, on the evidence introduced by the defendants, rendered a judgment in favor of the plaintiff for twenty-five dollars, and that the forfeited recognizance, as to the residue of the sum therein specified, "be set aside and remitted."

From that judgment the Commonwealth has appealed, insisting that the court below erred, *first*, in overruling the demurrer to the answer, and *secondly*, in remitting any part of the sum specified in the bond.

1. The answer was clearly insufficient. The power of the court to remit in such cases is derived solely from the 94th sec. of the *Criminal Code*, which provides that "if, before judgment is entered against the bail, the defendant be *surrendered* or *arrested*, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond." It has been held that the discretion here conferred is a judicial, not an arbitrary discretion, to be exercised upon consideration of the *facts* relied upon in the defense. (1 *Met. Ky. Rep.*, 383.) But the fact that the defendant had been either *surrendered* or *arrested* must be shown in the defense, and is indispensable to the exercise of the discretion allowed by this statute. What additional fact or facts, (if any,) might be necessary to justify the court in remitting the whole or part of the penalty in such cases, is a question the decision of which is not required by the present case. It is sufficient to say that the answer was clearly defective in failing to show either that the defendant had been surrendered or arrested as required by the section referred to.

2. It is proper to add that the bill of exceptions, which purports to contain "all the evidence in the case," does not show that either of the two essential facts mentioned was proved on the trial, although in the judgment it is recited that the defendant had appeared, was tried upon the indictment, and found not guilty, &c. If the facts so recited had been sufficiently alleged and proved, we should have hardly felt authorized, even in view of the other facts proved, and which are relied on by the appellant as highly prejudicial to the case made out by the appellee, to decide that the court had abused its discretion in rendering the judgment complained of.

But for the error mentioned the judgment is reversed, and the cause remanded with directions to sustain the demurrer to the amended answers, giving the defendants leave to amend if they shall offer to do so within a reasonable time, and for further proceedings not inconsistent with this opinion.

 Scott vs. Commonwealth

Wm. Kentuck

CASE 5—INDICTMENT—JUNE 18.

Scott vs. Commonwealth.

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APPEAL FROM THE MERCER CIRCUIT COURT.

1. Moral insanity, as a ground of defense in criminal cases, is so peculiarly liable to abuse that the utmost care and circumspection are required on the part of the court in presenting to the jury the legal principles relating to it.

2. To establish moral insanity as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature. But it is not necessary that it should have manifested itself "in former acts of similar character or like nature of the offense charged," to be available as a legal excuse for crime.

3. Before moral insanity can be admitted to excuse the commission of crime, it must be shown to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings. Whether this impossibility of resistance arises from a subjugation of the intellect by the morbid impulse or propensity, or "from an overwhelming and destruction of the faculties of the mind to the extent of rendering the party incapable of governing his actions," is a point of not much practical importance—though the former mode of expression is preferred as being less calculated to confuse or mislead the jury.

4. See the opinion for a discussion of the principles touching the question of moral insanity and its admission as a defense in criminal cases, with a reference to authorities.

HARLAN & HARLAN, for appellants, cited *Wharton & Stille's Med. Jur.*, pages 35 to 45.

HARDIN & KYLE, on same side.

A. J. JAMES, Attorney General, for Commonwealth, cited *Wharton's Amer. Crim. Law*, secs. 25 to 28 inclusive; 16 *B. Mon.*, 594; 1 *Russell on Crimes*, 13; *Roscoe's Crim. Evidence*, 944, 945, 946; *Wharton & Stille's, Med. Jur.*, secs. 177, 178, 183.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of conviction rendered by the Mercer circuit court, at its April term, 1863, against Edward D. Scott, who was indicted for the murder of his stepson, James Tilford.

The defense set up on behalf of the prisoner was that he was insane at the time of the commission of the homicide.

The grounds mainly relied on for reversal are, *first*, that the court erred in instructing the jury; and, *secondly*, in admitting important evidence.

1. The evidence relating to the question of insanity, as set out in the bill of exceptions, is quite voluminous, and need not be stated or referred to here, further than to say that it conduced to sustain the ground of defense relied on, sufficiently so, at least, to authorize the court to instruct the jury with regard to it.

At the close of the evidence, the court, having instructed the jury in substance that, although they might believe that the accused was unsound in mind, yet such unsoundness did not justify an acquittal on the ground of insanity, unless they believed that the accused, at the time of the commission of the act, did not know right from wrong in reference to the killing of the deceased, or if he did not know that such killing was wrong, that his mind was so disordered that he had not the mental power to control his actions,—gave the following instruction, marked No. 4:

“The court further instructs the jury, that, although they believe that the accused was laboring under what is termed *moral* insanity, yet moral insanity is no excuse in law for the commission of crime, unless the moral insanity overwhelmed and destroyed the faculties of the mind to such an extent as to render the accused incapable of governing his actions, at the time of the commission of the act; and the jury ought not to acquit upon such moral insanity, unless it had manifested itself in former acts of similar character, or like nature, of the offense charged.”

To this instruction two objections are urged by counsel for the appellant, the first and most obvious of which is that it requires the jury to find, as an indispensable condition of acquittal on the ground of *moral* insanity, that the insanity had manifested itself in former acts of homicide.

Such is undoubtedly the effect and meaning of the instruction, according to the fair and natural construction of the language used. And it hardly needs an argument to prove that in this respect, if in no other, the instruction was misleading

and erroneous, and prejudicial to the appellant. It is true that one witness, a physician, in a very brief statement of his professional opinion touching the characteristics of this disease, stated that "moral insanity never springs first fully developed, but is of gradual growth." This view is sustained as well by adjudged cases of the highest authority, as by the most approved elementary writers on this subject. In a case decided by the supreme court of Pennsylvania, it was said by Chief Justice Gibson, that "the doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. * * If juries were to allow it, as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case it is necessary either to show, by clear proof, its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency, developed in previous cases, becoming in itself a second nature." (*Wharton & Stille on Med. Jur.*, sec. 54.)

Although, therefore, this ground of defense is so peculiarly liable to abuse, to guard against which the utmost care and circumspection are required, on the part of the court, in presenting to the jury the legal principles relating to it, yet no authority has been found for the principle embodied in the instruction under consideration, which requires that moral insanity, before it can be made available as a legal excuse for crime, must have manifested itself "in former acts of similar character, or like nature, of the offense charged." And, in our opinion, the instruction was to this extent erroneous.

The other objection to the instruction is that it requires the jury to believe, from the evidence, that the moral insanity "overwhelmed and destroyed the faculties of the mind to such an extent as to render the accused incapable of governing his actions at the time."

We are not prepared to say that this, if properly understood, was too strong a statement of the principle, or that it was practically injurious to the appellant. For, in another case

cited by Wharton & Stille, it is said by Judge Lewis, that "moral insanity arises from the existence of some of the antural propensities in such violence that it is impossible not to yield to them. It bears a striking resemblance to vice, which is said to consist in an undue excitement of the passions and will, and in their irregular or crooked actions leading to crime. It is, therefore, to be received with the utmost scrutiny. It is not generally admitted in legal tribunals as a species of insanity which relieves from responsibility for crime, and it ought never to be admitted as a defense until it is shown that these propensities exist in such violence as to *subjugate the intellect*, control the will, and render it impossible for the party to do otherwise than yield. Where its existence is fully established this species of insanity relieves from accountability to human laws. But this state of mind is not to be presumed without evidence, nor does it usually occur without some premonitory symptoms indicating its approach." (*Med. Jur.* sec. 55.) And it is elsewhere laid down, in the same treatise, that "it is not to be supposed that a single impulse is diseased while all the other functions of the mind retain their healthy action. While the entire intellect enjoys sound health there is nothing in which a morbid desire of theft, murder, &c., could originate, and such a phenomenon is a psychological impossibility, and the assumption of such requires a psychological contradiction. A *mania sine delirio*, a mania without a morbid participation or disturbance of the perceptive faculties, is, therefore, out of the question, as a desire to injure or destroy is impossible without an act of the mind by which this purpose is entertained, and as reason and understanding are alike disordered, whether they insinuate a wrong motive for the morbidly conceived purpose of the act, or whether they entirely omit the suggestion of any reason whatever." (*Sec.* 177.)

Without going further into the discussion of this abstruse and perplexing subject, it is apparent from what has been said that, before this species of insanity can be admitted to excuse the commission of crime, it must be shown to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings. This is the fundamental

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fact to be established to the satisfaction of the jury. And whether this impossibility of resistance arises from a subjugation of the intellect by the morbid impulse or propensity, or from an overwhelming and destruction of the faculties of the mind to the extent of rendering the party incapable of governing his actions, is a point, it would seem, of not much practical importance. We think, however, that the form of expression used by Judge Lewis, in the passage before quoted, more aptly conveys the correct idea, and is, therefore, less calculated to confuse or mislead the jury than that adopted by the court below in the instruction we have been considering. Except in the particulars mentioned the court committed no error in giving or in refusing instructions.

2. Nor do we think the court erred in allowing a witness who had been introduced by the defendant, to be recalled and examined with the view of laying a foundation for contradicting her testimony in chief, by showing that she had made statements different therefrom. It is unnecessary to notice this point further, as no such question will probably arise upon a subsequent trial.

For the error mentioned the judgment is reversed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

CASE 6—PETITION EQUITY—JUNE 8.

Winn vs. Sam Martin, (of color.)

APPEAL FROM THE CLARK CIRCUIT COURT.

1. A testator, in 1837, provided that any of his slaves, at specified periods and at certain ages, wishing to be free, should be delivered "to the colonization society to be transported to Liberia. None of them are to be forced to go. Those that do not go to Liberia are to continue to serve, &c., until they are willing and do go." *Held*, That to entitle them to freedom they must go to Liberia in good faith to dwell there

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and become colonists. To go with a design to return immediately to the United States, which design is carried out, is not a compliance with the will.

2. The fact that a slave, thus returning, stayed in New York for about three months before his return to Kentucky, his owner knowing that he was there and making no effort to bring him away, did not give to such slave a right to freedom. He was there not with the consent of his owner, but as a fugitive slave.

SIMPSON & SCOTT, for appellant, cited 9 *B. Mon.*, 569; 12 *Ib.*, 549; 15 *Ib.*, 583; 16 *Ib.*, 368.

HUSTON & DOWNEY and FRENCH & GRIGSBY, for appellee, cited 7 *B. Mon.*, 403; 8 *Ib.*, 100; 15 *Ib.*, 338; 9 *Ib.*, 572; 2 *Marsh.*, 476; 13 *B. Mon.*, 329; 1 *Bibb*, 424; 4 *Dana*, 248; 12 *B. Mon.*, 238.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The appellee, Sam, was the slave of John Martin, who died in 1837, leaving a will, by which, after devising Sam and other slaves to his wife and children, he declared as follows: "At the expiration of eight years after my death all the negroes above bequeathed are to be offered to the colonization society, (if they are of age,) to be transported to Liberia, and those that are not of age to continue to serve the persons to whom they are allotted until they come of age, that is to say, the boys until they are 21, and the girls until they are 18 years of age, when they are also to be offered to the colonization society to be transported to Liberia. None of them are to be forced to go. * * Those that do not go to Liberia are to continue to serve the persons to whom they are allotted until they are willing and do go. * * Phil, Sam and Joe to be hired out the seventh year after my death, and the money arising therefrom to be given to those that first go to Liberia, ten dollars apiece, if there should be so much, and the balance, if any, given to those that next go."

Sam was allotted to Mrs. Taylor, who resided with her son-in-law, Morrison, who had the control of Sam.

In 1846, Sam, being of age, applied to Winn to purchase him, expressing a preference to remain in Kentucky as his slave, rather than go to Liberia, and his determination to go to Liberia if Mr. Morrison should refuse to sell him to Winn. Winn tried to buy him, but Morrison refused to sell for the sum offered. Sam then expressed to John Martin's executors a

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wish to go to Liberia, and they delivered him to the colonization society to be transported thither. The society soon afterward sent him, with other emigrants, to Liberia to be colonized, but he refused to become a citizen of the colony, and came back to New York on the vessel that took him out. Soon after reaching New York he caused a letter to be written to Winn, expressing his desire to return to Kentucky if Winn would buy him. In August, 1846, Winn purchased him, and he came to Kentucky and continued in the service of Winn until 1859, when he sued for his freedom and the value of his services. From a judgment in his favor Winn prosecutes this appeal.

The first question is, did Sam become entitled to freedom by going to Liberia? In our opinion he did not.

We need not detail the evidence. We regard it as establishing, beyond a doubt, that Sam never intended to become a Liberian colonist; that he announced his intention to go to Liberia for the purpose of inducing Morison to sell him at the price that Winn was willing to give; that he left Kentucky hoping that Winn would buy him before the sailing of the vessel on which he was to embark at New Orleans, and intending, in that event, to return without leaving the United States; and that, being disappointed in that hope, he went to Liberia intending to return as soon as possible to the United States, hoping that this technical performance of the condition of the will would induce Morrison to sell him to Winn, and intending in that event to return to Kentucky.

The testator did not provide for the outfit and transportation of his slaves, but threw that burthen upon the society. We perceive no reason to believe that he meant to put the slaves to the trouble of going to Liberia, and the society to the expense of transporting them thither, for the purpose of giving them a right to freedom. Under the laws then in force they might have remained as freemen in Kentucky or in a Northern State, if he had so desired. But he did not so intend. He required them to remain in servitude whilst in Kentucky; and, to prevent them from leaving Kentucky avowedly for the purpose

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of going to Liberia, but really for the purpose of settling in a Northern State, he required that any of them wishing to be free should be delivered "to the colonization society to be transported to Liberia." Their freedom was not his sole nor his chief object. His chief object was to promote the scheme of colonization, which many then regarded as giving promise of a peaceful and happy solution of the problem of African slavery. The object of the society was to colonize Liberia with negroes from the United States. The testator's object was to furnish Liberian colonists. Sam, in going to Liberia with a concealed design to return immediately to the United States, did not comply with the will of the testator, but attempted to take an unfair advantage of his benevolent purpose, and committed a fraud upon the colonization society instead of promoting its success according to the testator's intention.

If he had gone to Liberia in good faith, to dwell there, and had become a colonist and thus acquired a right to freedom, we do not suppose that he would have forfeited that right by afterward leaving the colony. But we need not decide that question now.

We do not regard the cases of *John vs. Moreman et al*, 8 B. Mon., 101, and *Graham's Ex'r. vs. Sam et al*, 7 B. Mon., 405, cited by appellee's counsel, as containing anything in conflict with this opinion. In the former case it was held that a slave, entitled to his freedom upon condition that he should go to Liberia, was entitled to the value of his services from the time of his electing to go. In the latter case the testator declared that if, within ten years, any of his slaves should "become willing and give themselves up to embark for Liberia, I do hereby emancipate all such for that purpose." One of them, a female, within ten years, elected to go to Liberia; and it was held that her right to freedom related back to the death of the testator, so as to give freedom to her children born in the meantime. In those cases it was assumed that there was an election, in good faith, to comply with the condition on which the right to freedom depended. Sam's conduct leaves no room for such an assumption in this case.

Slavery is prohibited by the laws of the State of New York. The evidence conduces to prove that Morrison was informed that Sam was in the city of New York soon after his arrival there. And it is contended that the failure of his owners, during a period of about three months, to make any effort to bring him away from New York, gave him a right to freedom. If so, his voluntary return to Kentucky would probably have deprived him of the right thus acquired. But, in our opinion, his stay in New York did not give him a right to freedom. He went and remained there, not with the consent of his owners, but as a fugitive slave. We are not aware of any case in which it has been held that the failure of a master, during three months or any other period, to attempt to capture a fugitive slave in a non-slaveholding State, entitles the slave to freedom. Nor do we perceive any reason to believe that Sam could have been found and captured with such facility, that a failure to make the attempt raises a presumption that he remained there with the consent of his owners.

It is also contended that Winn agreed to emancipate Sam after realizing from his services the sum paid to Morrison. If such an agreement had been made with Sam it could not be enforced. But it is not proved that Winn so agreed either with Sam or Morrison. The fact that he made the purchase for much less than Sam now appears to have been worth does not conduce to prove such an agreement, since there were other obvious causes affecting the price. Nor would Morrison's statement, that he did not consider Sam a slave, nor sell him as such, be sufficient to establish such an agreement, if conceded to be true. But the bill of sale, signed by Morrison and his wife and Mrs. Taylor, proves conclusively that they did sell him as a slave.

As Sam failed to allege that he now wishes to be placed in charge of the colonization society, to be transported to Liberia, he did not show himself entitled to any relief.

The judgment is reversed, and the cause remanded with directions to dismiss the petition.

CASE 7 ——— JUNE 5.

Applegate vs. Applegate.

APPEAL FROM THE PENDLETON COUNTY COURT.

1. A final order either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such a manner as to put it out of the power of the courts making the order, after the expiration of the term, to place the parties in their original condition. (15 B. Mon., 48.)

2. An order of a county court refusing to qualify a person as a deputy sheriff on motion of the sheriff, is not a final order, and no appeal lies.

3. The right of approval, and implied right of disapproval, of the appointment of a deputy by the sheriff, conferred by law on the county court, belongs to the executive and not the judicial power of the court. (3 J. J. Mar., 401.)

4. Mandamus is an appropriate remedy whereby the county court may be compelled to show cause why they refuse to approve and qualify a deputy appointed by the sheriff. (3 B. Mon., 198.) From the judgment of the circuit court, in such proceeding, an appeal lies to the Court of Appeals.

JNO. E. RECORDS, for appellant cited, *Constitution of Ky., art. 6, sec. 4; Rev. Stat. chap. 91, art. 1 sec. 6.*

JUDGE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Jas. T. Applegate, being sheriff of Pendleton county, appointed Wm. M. Applegate his deputy, and desired the county court to qualify him as such, which the court refused to do, solely because said William was under twenty-one years of age; whereupon this appeal was prosecuted.

By section 15, *Civil Code*, this court has appellate jurisdiction over the final orders and judgments of all other courts of this Commonwealth, subject to the exceptions in section 16.

"A final order either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such a manner, as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition." (*Maysville & Lex. R. R. Company vs. Punnett*, 15 B. M., 48.)

The refusal of the county court to qualify this deputy did not preclude the court from doing so at a subsequent term, had the

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court changed its mind. It is not therefore a final order over which this court has jurisdiction.

"Every sheriff may, by and with the approval of the county court, appoint his own deputy." (*Sec. 6, chap. 91, vol. 2 Stant. Rev. Stat.*, 340.) The appointing power although vested in a court is executive and not judicial. (*Taylor vs. Commonwealth*, 3 J. J. Mar., 401.) The right of approval, and implied right of disapproval, conferred by law on the court, appropriately belongs to the executive, and not the judicial, power of the court.

Mandamus from the circuit to the county court is an appropriate remedy whereby the county court may be compelled to show cause why they did not approve and qualify this deputy. (*Duy vs. the Justices of Fleming County Court*, 3 B. Mon. 198.) In this kind of proceedings the sheriff on the one side, and the county court on the other, could present the causes of complaint and refusal, so that this court could adjudicate between them, after a full hearing of both parties, and direct the proper determination.

This limitation on the power of the sheriff was doubtless conferred on the court the better to protect the public interest of each county, and, before its acts are interfered with, it should be heard.

Wherefore the appeal is dismissed.

CASE 8—PETITION EQUITY—JUNE 6.

Radford vs. Chamberlain.

APPEAL FROM THE CHRISTIAN CIRCUIT COURT.

1. A decree for the sale of land, held in trust for the separate use of a married woman, is rendered void by a failure to have a report of commissioners stating the value of her estate, the annual profits thereof, and that her interest requires the sale to be made.

BRISTOW & PETREE, for appellant.

HARLAN & HARLAN, for appellee, cited *Civil Code*, secs. 539, 540; 1 *Met.*, 284.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The only question that we need to decide is, whether or not a decree for the sale of land, held in trust for the separate use of a married woman, is rendered void by a failure to have a report of commissioners stating the value of her estate, the annual profits thereof, and that her interest requires the sale to be made.

In chap. 86, art. 5, of the *Revised Statutes*, several regulations concerning the sale of lands and slaves of married women are followed by this provision:

"The proceedings under this article shall, in other respects, be the same as are required to procure the sale of infants' lands."

One of the provisions thus adopted and applied to proceedings for the sale of the lands of married women is in these words:

"§ 2. Before a court shall have jurisdiction to decree a sale of infants' lands—1, three commissioners must be appointed to report, and must report under oath to the court, the net value of the infants' real and personal estate, and the annual profits thereof, and whether the interest of the infant or idiot requires the sale to be made."

It has been repeatedly decided that, under this provision, the failure to have such a report as the statute requires renders void a decree for the sale of an infants' lands and all proceedings under it. (18 *B. Mon.*, 782; 2 *Met.*, 515; 3 *Id.*, 524.) It necessarily follows that the decree and the proceedings under it, in this case, are void.

The fact that the statute, (art. 5, sec. 1. sub. sec. 7.) expressly declares that a failure to give the covenant required for the benefit of the married woman shall render the decree void, whilst it does not expressly declare that a failure to have a report of commissioners, concerning the value of her estate, &c.,

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shall render the decree void, is not sufficient to prove that the framers of the statute intended that the failure to have such a report should render the decree erroneous merely and not void, since the provisions concerning the sale of infants' lands are marked by the same peculiarity.

In our opinion the context of the statute and the apparent object of its framers prove, that, in declaring that "the proceedings under this article shall, in other respects, be the same as are required to procure the sale of infants lands," they did not intend merely to direct that a report of commissioners should be made concerning her estate, but that they intended that the same provisions should apply to both classes of cases, and that the same consequences should result from a failure to conform thereto.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.

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 CASE 9—PETITION ORDINARY—JUNE 9.

Young et al vs. Duhme & Co.

APPEAL FROM THE HARRISON CIRCUIT COURT.

1. A demurrer to the answer brings the whole of the pleadings before the court, and, in deciding upon the demurrer, it is the duty of the court to decide against the party who committed the first fault. (5 Mon., 528; 3 Mar., 322.) If the petition is insufficient, it must be so adjudged.

2. Upon the marriage of an administratrix she ceases to be the personal representative of the intestate; and an action against her, after that event, will not lie to establish a debt against his estate and test the question of assets to discharge the debts. (Rev. Stat., chap. 37, art. 1, sec. 16.)

3. The principle that a personal representative is regarded in equity as a trustee for creditors and others interested in the estate, that the assets are trust funds for their benefit, and that a court of equity will take jurisdiction in favor of a creditor who has not even obtained a judgment at law, not only to compel a discovery, but also to render the personal representative liable for a breach of trust by waste or

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mal-administration of the assets, (3 *Dana*, 392; 5 *Ib.*, 411,) does not apply to the action *supra*.

4. A creditor, before he can maintain his action against the sureties in the administrator's bond for a *devastavit*, must obtain a judgment against the personal representative establishing his debt and fixing upon him assets sufficient to discharge the debt, or a part of it; but a return of *nulla bona* on an execution issued thereon is not an essential prerequisite to such action.

A. H. WARD, for appellants, cited 1 *Rev. Stat.*, page 500, *sec.* 16; 5 *Mon.*, 101; 18 *B. Mon.*, 209; 2 *Rev. Stat.*, page 10, *sec.* 3; *Ib.*, page 133, *sec.* 6.

W. W. CLEARY, on same side, cited 2 *Rev. Stat.*, 133.

W. W. TRIMBLE, for appellees, cited 18 *B. Mon.*, 209; 8 *Dana*, 186; 8 *B. Mon.*, 508; *Act of 1851*, 2 *Rev. Stat.*, 133; 2 *Stat. Law*, 1147; *Civil Code*, *secs.* 126, 128; 5 *Dana*, 411; *Ib.*, 507; 3 *Dana*, 392; 7 *Dana*, 264-5; 6 *J. J. Mar.*, 228; 3 *J. J. Mar.*, 633; 3 *Mon.*, 356; 5 *Mon.*, 20; 4 *J. J. Mar.*, 50; 7 *Ib.*, 189; 9 *Dana*, 428.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

Upon this record two appeals are prosecuted, from two distinct judgments against the same parties.

The first one is from a judgment rendered in favor of the appellees against appellants, in an action brought in the court below, upon certain notes executed by Bushnell Willey in his life time, to them, and upon an account for articles sold to said Willey by E. Hill, and by Hill assigned to appellees.

From the allegations of the petition in the first case it appears that said Willey, who was a citizen of Harrison county, Ky., at the time, died in 1850; that administration upon his personal estate was, by the proper court, granted to his widow, (now Mrs. Susan Young,) on the 12th day of August, 1850, who executed an administration bond with John Lail and Jas. Robertson, her sureties; that in 1853 the administratrix intermarried with appellant, W. L. Young, and that John Lail, one of the sureties in said bond, has departed this life intestate, and administration on his personal estate has been, by the proper court, granted to the appellant, Joseph Shawhan. In the petition it is also alleged that administration on the estate of said Willey, in the State of Illinois, was granted, in said State, to one E. A. Payne, who, under proceedings in some of

the courts in that State, had sold several tracts of land in Illinois which had belonged to said Willey, and that appellees purchased said lands on the 21st of October, 1857, at the price of \$3,800; that \$3,162.76 of said sum was credited on the notes they held on said intestate, and that appellee, Duhm, had executed to said Payne, administrator as aforesaid, his note for \$800, the balance of the purchase price of said lands, to pay costs and necessary expenses attending the administration and settlement of the estate in Illinois. It is further alleged that the personal estate of the intestate, of the value of \$13,612.18½, came to the hands of the administratrix, about \$7,000 of which was applied by her to the payment of debts, and the balance the administratrix and her husband, W. L. Young, had wasted and converted to their own use; and that Young had, by his marriage with the said Susan, received "*property*" which belonged to her and which had descended to her upon the death of her father, more than sufficient to pay off and discharge the whole of their demands. Other matters are alleged which it is not deemed material to notice.

Appellants answered this petition, and stated that the administratrix had fully administered all the assets which came to her hands to be administered, before the institution of this suit; that she had settled her accounts with the presiding judge of the Harrison county court, which settlement had been approved and ordered to record, a copy of which was referred to and filed as part of the answer, from which it appears that by crediting the appellee, Susan Young, by the amount she had paid out, and the amount allowed her for her commissions, &c., the estate is indebted to her in the sum of \$275.13.

They deny in their answer that the debts claimed in the petition have ever been legally demanded of the administratrix, insist that more than seven years had elapsed from the time she qualified until the institution of the suit, rely upon the statute of limitations as a bar to the whole action, and, also, as to so much of it as is founded on the account assigned to the plaintiffs by Hill.

In the 3d paragraph of a supplemental answer, filed by appellants, they allege that said E. A. Payne and appellees col-

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lected together, and, by covin and fraud, procured a sale of the lands in Illinois to be made under some pretended proceedings in the courts in said State, at which sale appellees purchased the lands; but that said court proceedings were not in accordance with the laws of said State, and that the sales made under said proceedings were void, and that appellees, by their purchase and the conveyance of the lands to them under said sale, acquired no title whatever to said lands. They refer to, and say they will file as part of their answer, copies of said proceedings from the courts of Illinois so soon as they can be procured. They allege that the lands were worth at least \$25,000; that they are of the annual value of \$; that appellees took possession of them directly after their pretended purchase; that they and their tenants had been in possession of them ever since; and that the rents and profits of said lands were more than sufficient to pay the whole of the debts claimed by appellees. Many of the alleged irregularities and defects in the proceedings and sale of said lands are specifically set forth.

Other matters were set up in said supplemental answer, but they need not be noticed. To this 3d paragraph appellees demurred; their demurrer was sustained, no amendment was filed, and, upon the trial of the cause, judgment was rendered for appellees for the amount of the several notes and interest thereon, named in the petition; and, as to so much of the petition as sought a recovery on the account assigned by Hill, it was dismissed.

The demurrer of appellees to the answer brought the whole of the pleadings before the court, and, in deciding upon the demurrer, it was the duty of the court to decide against the party who committed the first fault. (*Mitchell vs. Vance*, 4 G., 5 Mon., 528; *Birney vs. Hunn*, 3 A. K. Mar., 322.)

The first question for our determination then, is, are the facts stated in the petition sufficient to constitute a cause of action against appellants? And, in considering this question, we will treat the action as having been designed to be brought by appellees upon their original demand against the personal representative of Willey, for the purpose of establishing their debt,

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and trying whether there are assets to discharge it; although the surviving surety in the administration bond and the personal representative of the deceased surety are made defendants in the action, and although some of the allegations in the petition would indicate that the action was brought, for a *devastavit*. Otherwise the judgment would be most obviously erroneous.

By section 16, art. 1, chap. 37, vol. 1, *Rev. Statutes*, page 500, it is declared that "if an unmarried woman, who is a personal representative, either alone or jointly with another, shall marry, her husband shall not be a personal representative in her right; but the marriage shall operate as an extinguishment of her authority, and the other personal representative, if there be any, may proceed in discharging the trust as if she were dead. If there be no other, administration *de bonis non* may be granted by the court."

By the marriage of Mrs. Young, which, according to the allegations of the petition, occurred prior to the institution of this suit, she ceased to be the personal representative of the intestate Willey; and a suit against her, after that event, was as ineffectual to establish the debts against the estate of Willey, and to test the question of assets to discharge said debts, as a suit against any other citizen of Harrison county would have been.

It is true, as was held by this court in *Pilkinton's Ex'r. vs. Gaunt's adm'r.*, (5 *Dana* 411,) and in *Strodd's heirs vs. Barnett*, (3 *Dana*, 392.) that an executor or administrator, being regarded in equity as a trustee for creditors and others interested in the estate, and the assets being trust funds for their benefit, the court of equity may take jurisdiction in favor of a creditor who has not even obtained a judgment at law, not only to compel a discovery, but also to render the executor or administrator liable for a breach of his trust by waste or mal-administration of the assets. In the cases, *supra*, the proceedings were against persons still retaining the character of executor or administrator, and not against those who had ceased to represent the estate, as is the case here. Besides, this is not a suit in equity; no discovery of assets was sought, and the pe-

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tion is not, either in substance or form, sufficient to bring the case within the principles of the cases referred to; it was not drawn with that design, as is evident, not only from the petition itself but from the judgment which was rendered in the case and from the petition in the second case, in which it is expressly averred that the plaintiffs, at the May term, 1800, of said court, "obtained a judgment against said Young and wife, *administratrix* and administrator of B. Willey, deceased, to be levied of assets of decedent which came to their hands to be administered, &c."

The statute has provided for any that might otherwise result to creditors or others interested in the estate, by requiring that the court shall grant administration *de bonis non* to some other proper person, where, upon the marriage of the female representative, there is no other personal representative to discharge the trust. As the facts, alleged in the first petition, were not sufficient to constitute a cause of action against appellees, the demurrer to the answer should have been overruled, and should have been sustained to the petition.

The judgment is therefore *reversed*, with directions to sustain the demurrer to the petition and for further proceedings consistent with this opinion.

But little remains to be said upon the subject of the judgment in the other case. It is a suit upon the administration bond against the principal and sureties, suggesting a *devastavit*.

However learned judges may have heretofore differed, as to whether one or two judgments were necessary against the personal representative, before the sureties in the administration bond could be made responsible for a *devastavit*, it is now authoritatively settled that a creditor, before he can maintain his action against the sureties in the administration, must have obtained a judgment against the *personal representative* establishing his debt, and fixing upon him assets sufficient to discharge said debt, or a part of it, although a return of *nulla bona* on an execution issued upon such judgment "*is not an essential prerequisite to an action upon the bond for a devastavit.*" (*McCalla's adm'r. vs. Patterson, &c.*, 18 B. Mon., page 207.)

Calvert vs. Sasseen.

As it does not appear in this case that any judgment had been obtained by appellees against the personal representative of the intestate, prior to the institution of this suit, no cause of action was shown against appellee.

Wherefore the judgment is *reversed*, and the cause is remanded with directions to allow the appellees to amend the petition if they should offer to do so within a reasonable time; and, if they fail to make such amendment, that the petition be dismissed.

CASE 10—PETITION ORDINARY—JUNE 11.**Calvert vs. Sasseen.**

APPEAL FROM THE CALDWELL CIRCUIT COURT.

1. A parol agreement between debtor and creditor that a buggy of the former should be valued by two men to be thereafter selected for that purpose, the creditor to take it at such valuation and credit the amount he held on the debtor; if the valuation should exceed the amount of the note the creditor to pay the excess. There had been no valuation, no change of possession, when an attachment, sued out by another creditor of the debtor, was levied upon the property. *Held*, That the agreement passed no right, legal or equitable, to the property, and that the attachment be sustained.

2. For a breach of the agreement, *supra*, by either party to it, an action for damages would be the only remedy.

W. H. CALVERT, for appellant, cited, 1 *Parsons on Contracts*, 440, 441; *Id.*, 139; 7 *Dana*, 60; *Chitty on Contracts*, 2 *Am. Ed.*, 111, 112.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

In this action an attachment issued and was levied, among other things, on a buggy, as the property of the defendant, Stone. Sasseen filed his petition, claiming the buggy as his own, under an alleged purchase from Stone prior to the suing

out or levy of the attachment. He states that he held a note on Stone for \$128, and took the buggy in part payment of the debt at the price of \$75.

The court below sustained the claim of Sasseen to the buggy, and the plaintiff Calvert has appealed.

The evidence wholly fails to establish the alleged purchase of the buggy, or to show that even the price alleged or any other price had been fixed by the parties. The testimony of the witnesses introduced by Sasseen is substantially this: It was agreed by Sasseen and Stone, a few days before the attachment issued, that the buggy should be valued by two men to be thereafter selected for that purpose, Sasseen to take the buggy at such valuation and credit the amount on the note he held on Stone; if the valuation should exceed the amount of the note, Sasseen was to pay the excess; that the buggy was to be brought to town for the purpose of being valued, but that had not been done, nor had there been any valuation according to the agreement, nor any change of the possession of the property up to the time the attachment was levied.

Upon these facts it would hardly be pretended that there was a sale and purchase of the buggy, such as passed the title to Sasseen. Nor did the agreement, as proved, invest him with such an equity as the chancellor could have enforced, either as against Stone himself or his attaching creditor. It was neither a mortgage nor pledge of the property to secure the payment of the debt, the agreement being in parol, and unaccompanied by a delivery of the possession. It was nothing more than a mere agreement to sell, to be executed at a future time, and upon terms to be thereafter fixed in the mode prescribed. Obviously it was an agreement which a court of equity would not have enforced specifically even as between the parties, and which therefore passed no right, legal or equitable, to the thing. For a breach of the agreement by either party an action for damages would have been the only remedy.

It results that, as the appellee failed to establish any right, legal or equitable, to the property in dispute, his petition should have been dismissed, and the appellant's attachment sustained.

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The judgment is therefore reversed, and the cause remanded for a judgment and further proceedings as indicated.

CASE 11—PETITION EQUITY—JUNE 12.

Havens, &c. vs. Foudry, &c.

APPEAL FROM THE FLEMING CIRCUIT COURT.

1. A surety, who pays a debt, is entitled to stand in the place of the creditor as to all liens and equities to which he has a right to look as a security for the payment of his debt. This general equitable principle is well settled.

2. In such case it must be shown that, at the time the surety paid the debt, the creditor had a valid and subsisting lien or equity such as a court of equity would have enforced at his instance for the satisfaction of his debt.

3. A creditor is allowed to be substituted to any securities provided by the principal debtor for the indemnity of his sureties. But, as the equity is derived through the sureties, and as a consequence of their liability for the debt, whatever act or omission of the creditor may operate to discharge or release them from liability has the effect to destroy his equity. (10 *Leigh*, 206; 12 *Ib.*, 387.)

4. Where a judgment against the principal debtor and his sureties is replevied by him with other sureties—the defendants in the judgments, who are only sureties for the debt, refusing to join in the bond—the latter are released from liability. The execution of the replevin bond in such cases merges the judgment, and releases the original sureties. (2 *B. Mon.*, 303; 1 *Met.*, 252.)

5. Where, in such case, the original sureties, thus released from liability, were indemnified by mortgage against loss, the sureties in the replevin bond who pay the debt, have no equity, as against other lien holders, under such mortgage.

ANDREWS & COX, for appellants, cited 1 *Lead. Cases in Equity*, top pages, 105, 124.

Wm H. CORD, for appellees, cited 4 *B. Mon.*, 134; 7 *Ib.*, 303; 6 *Ib.*, 395; 11 *Ib.*, 335; 9 *Ib.*, 578; *Ib.*, 399; *Ib.*, 292; 1 *Story's Eq.*, 478; 2 *Johnson's Chy. Rep.*, 560; 4 *Ib.*, 123; 12 *B. Mon.*, 45, 137; 8 *B. Mon.*, 205; 3 *Story's Rep.*, 400; 8 *Vesey*, 388-9; 1 *Ib.*, 339; 2 *Ib.*, 569-70; 3 *Bligh*, 591; 7 *Johnson*, 505; 4 *B. Mon.*, 143;

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12 *B. Mon.*, 145; 2 *White & Tudor's Lead. Cases*, part 1, 214; 2 *Simon's Rep.*, 155; 2 *Hare*, 646; 2 *Swanston*, 185; 12 *Wheaton*, 594; 5 *Dana*, 241; 2 *Barb. N. Y. Ch'y. Rep.*; 338; 5 *Leigh*, 414; 4 *Watts*, 36; 10 *Serg. & Rawle*, 132; 2 *Rawle*, 132; 1 *Burr.*, 512.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

In October, 1859, Foudry executed to Havens and others two deeds of conveyance which, with the defeasance executed on the same day by the grantees, was intended to operate as a mortgage to secure and indemnify the grantees, who were sureties of Foudry in various specified debts, against loss or damage on account of their suretyship. Among those debts was a note to Kendall for \$1,100, on which Davis and Northcott were bound as sureties of Foudry. Kendall having obtained judgment on this note, execution issued against all the obligors, and in May, 1860, it was replevied by Foudry as principal, with McGregor and others as sureties—Davis and Northcott, the sureties in the original debt and defendants in the execution, refusing to join in the execution of the replevin bond.

The sureties in the replevin bond having been compelled to pay the debt, brought this suit in equity, claiming a personal judgment against Foudry, Davis and Northcott, and also that they were entitled, by substitution, to the indemnity provided by the mortgage from Foudry to his sureties. They furthermore allege that they executed the replevin bond at the instance of Davis and Northcott, who were to indemnify them by a transfer of their interest under the mortgage, and that their failure to join in the replevin bond was the result of a mistake on the part of the sheriff. These allegations were denied, however, and were wholly unproved.

The relief sought by the plaintiffs was resisted by Havens and the other mortgagees, who claim that they are entitled to the benefit of all the mortgaged property for the payment of the debts on which they were bound as sureties and which debts had been paid by them, and that the debt to Kendall having been satisfied in the manner stated, neither Davis nor Northcott, nor the replevin sureties who paid it, had any interest whatever in the mortgaged property.

The court below, on final hearing, rendered a judgment deciding in effect that the plaintiffs, McGregor and others, were entitled, by substitution, to all the rights and equities of Davis and Northcott under the mortgage, and to share equally with the other mortgagees in the distribution of the fund arising from the sale of the property. From that judgment Havens and others have appealed.

On the part of the appellees it is contended that the propriety of this judgment is maintainable upon the well settled equitable principle, that a surety who pays a debt is entitled to stand in the place of the creditor, as to all liens and equities to which he has a right to look as a security for the payment of his debt. The soundness of this general principle cannot be questioned. But to bring the present case within it, it must, of course, be shown that at the time the appellees paid the debt to Kendall he had a valid and subsisting lien upon the property in contest, such a lien as a court of equity would have enforced at his instance for the satisfaction of his debt.

What, then, were the rights and equities of Kendall with respect to the mortgaged property, either at the time the appellees became bound for his debt, or at the time they paid it?

As has been stated, the object of the conveyance from Foundry to his sureties was to indemnify them against any loss which either of them might sustain in consequence of their several suretyships; and such was the legal effect of the deeds. If, then, Kendall acquired any interest under the deeds, it was not on the ground of any contract between the grantor and him, nor of any direction, or intention, express or implied, on the part of the grantor, in his favor. His right, whatever it was, rested solely on the principle of subrogation, according to which a creditor is allowed to be substituted to any securities provided by the principal debtor for the indemnity of his sureties. And this arises, as has been well said, not from any notion of mutual contract between the parties, that in providing for the surety the creditor shall be equally provided for, but from a principle of natural equity independent of contract, namely, that to prevent the surety from being first har-

raised for the debt, and then turning him round to seek redress from the collateral security given by the principal, a court of equity will authorize and even encourage the creditor to claim, *through the medium of the surety*, all the rights he has thus acquired, to be exercised for his benefit and in discharge of his obligations. (10 *Leigh*, 221.)

It is clear, therefore, that as long as Davis and Northcott remained bound, as sureties in the debt to Kendall, he had an equitable lien upon the security provided by the mortgage for their indemnity, a lien which he might have enforced by appropriate action, the necessary effect of which would have been to benefit the sureties by exonerating them from personal liability to the extent, at least, to which the debt might have been satisfied out of the mortgage security.

It is equally clear that as Kendall derived his equity through the sureties, and as a consequence of their liability for the debt, whatever act or omission of his may have operated to discharge or release them from liability, had the effect necessarily to destroy his equity. For the right of the sureties to participate with their co-mortgagees in the mortgage fund ceased immediately upon their release, and there was consequently no equity left for the creditor to assert by substitution.

Were the sureties, Davis and Northcott, released from liability by the execution of the replevin bond in which they refused to join? This is no longer an open question. In the cases of *Kouns vs. Bank of Kentucky*, (2 *B. Mon*, 303.) and *Hoskins vs. Parsons*, (1 *Met. Ky. Rep.* 252.) it is expressly decided that the execution of the replevin bond in such cases merges the judgment and releases the original sureties in the debt.

The very act, then, which rendered the appellees liable as sureties on the replevin bond discharged the original sureties as effectually, for all purposes, as if the creditor had given them a direct and formal release, he having failed to take steps for quashing the bond, as he might have done, within a reasonable time after its execution.

It results, from what has been said, that at the time the appellees paid off the replevin bond the creditor whose debt they

paid had no equitable right to the fund in contest, by substitution or otherwise, and they of course could acquire none. Had Davis and Northcott been the only beneficiaries under the mortgage, they would have had no interest in opposing the appellees' claim, and it may be that the principal debtor, Foudry, could not in that case have objected to the application of his property in this proceeding to the payment of his debt. However that may be, it is quite certain that the other sureties, for whose indemnity the deeds were made, have the right to claim complete indemnity out of the fund, and for that purpose to resist the burden sought to be imposed on it by the claim set up by the appellees.

We are not aware that any case involving the precise questions we have been considering has been decided by this court. The principles that have been stated, however, have been recognized and acted on by very high judicial authority.

In the case of *Hopewell vs. the Cumberland Bank of Ayleahy*, (10 Leigh, 206) decided by the Court of Appeals of Virginia, several persons were bound as sureties for one Machir in bond, and others were indorsers of notes for his accommodation at different banks, which notes had matured and been protested for non-payment. Machir, by deed of trust, conveyed certain property to be sold and applied to the indemnity of each and all his indorsers in case they should sustain loss by reason of their suretyships and indorsements; the indorsers of a note held by one of the banks were discharged from liability by the laches of the bank in failing to give notice of protest, so that the indorsers of this note were never damnified, while other sureties and indorsers were; it was held that the bank could only claim to be subrogated to the rights of the indorsers of the note which it held, and these having sustained no damage, and so having no claim to participate in the trust fund themselves, therefore the bank had no claim to participate in it.

In the subsequent case of *The Bank of Virginia vs. May*, reported in 12 Leigh, 387, a deed of trust was executed to indemnify a first indorser at bank, from loss; the note was not paid, but the first indorser was discharged from liability by the failure of the bank to give him due notice of dishonor: The court held,

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on the authority of the former case, that neither the bank nor any subsequent indorser had any claim to rank as creditor on the trust fund under the deed, by subrogation to the first indorser, who was thereby indemnified, but who, having been released from liability, had never sustained any loss.

It follows that the court below erred in appropriating any portion of the fund created by the mortgage, to the satisfaction of the appellees' demand against their principal in the replevin bond. And the judgment is therefore reversed and the cause remanded for further proceedings in conformity with this opinion.

CASE 12—MOTION—JUNE 16.

Foster, &c. vs. Wade.

APPEAL FROM THE SIMPSON CIRCUIT COURT.

1. In a proceeding by motion against a sheriff and his sureties for the recovery of money collected by him on execution, if the motion is not made in court, nor entered on the motion docket, on the day specified in the notice, the motion shall be considered as abandoned. (*Civil Code*, sec. 482.) And a judgment subsequently rendered is a nullity.

2. Notice of a motion against a sheriff was given for the four & day of the next term. On the third day of the term this order was made: "*Notice filed and ordered to lie over.*" No further steps were taken at that term. At a subsequent term the plaintiff "*renewed*" his motion for judgment which is ordered to lie over;" and, at the same term, judgment was rendered by default. *Held*, That there was no motion pending, and that the judgment was void.

CHAS. GREEN, for appellant, cited *Civil Code*, secs. 482, 691, 391, 384, 483, 578, 579, 580, 94.

J. C. WILKINS & C. W. MILLIKEN, for appellee, cited *Civil Code*, secs. 376, 377, 378, 380, 381.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

This was a proceeding in the Simpson circuit court, by motion, against Foster, the sheriff of Allen county, and his sureties, to recover the money alleged to have been collected by the sheriff on an execution which had issued from the office of the clerk of the Simpson circuit court.

The notice was executed on the defendants on the 11th of March, 1861, warning them that the motion would be made on the *fourth* day of the next June term of the court.

It appears from the record, that on the *third* day of the term specified, this order was made: "Notice filed and ordered to lie over." No further steps were taken in the case at that term, nor until the June term, 1862, when, on the fourth day thereof, "the plaintiff appeared by his attorney and *renewed* his motion for judgment which is ordered to lie over;" and on the last day of the same term, judgment, by default, was rendered against the defendants for the amount claimed, with damages thereon and costs. From that judgment the defendants have appealed.

1. The first and most important question to be decided is whether, at the time the judgment complained of was rendered, there was any motion then pending in court. If not, the judgment was not only erroneous but was void.

In the solution of this question all difficulty is removed by the provisions of the Civil Code regulating "summary proceedings." (*Sections 470 to 484, inclusive.*)

After specifying the cases in which such proceedings may be adopted, prescribing the manner in which the notice shall be served, and its requisites, which are that it shall state the nature and grounds of the motion and the day on which it will be made, it is declared that "unless the motion is made or entered on the motion docket on the day specified in the notice, it shall be considered as abandoned."

Now it is certain that no motion was made on the fourth day of the June term, 1861, that being the day specified in the notice. It is true that a mere application for an order is a motion, according to *section 691 of the Code*, but here there was

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no such application on the day mentioned. And by the bill of exceptions it is shown that the motion was never at any time entered on the motion docket.

Inasmuch, then, as neither of the alternative requirements of the law was complied with—as the motion was not made in court, nor entered on the motion docket on the day specified, the inevitable consequence declared by the statute is that the motion should have been considered as abandoned. The entry already noticed as having been made on the *third* day of the term imparted no validity to the subsequent proceedings. To say that such an entry of record was equivalent to a motion made on a succeeding day, or to an entry on the motion docket on that day, would be a gross and palpable disregard of a plain statute.

Whether the entry of the motion and notice on the record on the day specified would not have been in effect a compliance with the statute, is a point not before us, and therefore not decided.

As the judgment was a nullity for the reason that there was no case pending in court at the time it was rendered the court below erred in overruling the application subsequently made by the appellants, to set aside the judgment.

Wherefore said judgment and the order last mentioned are reversed, and the cause remanded for further proceedings in conformity with this opinion.

CASE 13—PETITION ORDINARY—JUNE 16.

Cobb vs. Stewart, &c.

APPEAL FROM THE UNION CIRCUIT COURT.

1. Where lands are devised by a testator, and after his death a patent issues to him therefor, the legal title upon the issuing of the patent vests in his heirs, who hold the title thus acquired in trust for the benefit of the devisees under the will.

2. In such case, in a suit by the devisees to recover the land, the heirs are necessary parties; and the action must be in equity.

3. Where the cause of action, prosecuted by ordinary proceedings, is exclusively of equitable jurisdiction, it is the duty of the plaintiff to amend his pleadings and move the court to transfer the action to the proper docket. (*Civil Code, sec. 7.*)

4. To avail himself of the error of the circuit court in overruling his motion to require the plaintiff to verify the petition, by affidavit, the defendant should, at the time, except to the decision of the court.

This action was brought by appellees to recover 200 acres of land in possession of the appellant. Judgment having been rendered for the plaintiff the defendant prosecutes this appeal.

HARLAN & HARLAN, for appellant, cited 9 *Dana*, 323; 3 *B. Mon.*, 117; 5 *B. Mon.*, 151-60; 2 *J. J. Mar.*, 408; 4 *Dana*, 36; 16 *B. Mon.*, 124-5; 4 *Bibb*, 330; 7 *B. Mon.*, 81; 1 *Ib.*, 368; 2 *Mar.*, 418; 2 *Litt*, 362; 4 *Dana*, 322, 501; 6 *B. Mon.*, 438; 9 *Ib.*, 246; 4 *Mon.*, 51; 2 *Stat. Law*, 933; 7 *Dana*, 141-2; *M. & B. Dig.*, 779; *Rev. Stat.*, chap. 46; 4 *Bibb*, 386; 1 *Mar.*, 200.

LINDSEY & HUSTON, for appellees, cited *Hardin*, 464; *Dallam vs. Hanley*, 2 *Mar.*, *Shields vs. Dodd*, 5 *Litt.*; *Gaines vs. Buford*, 7 *J. J. Mar.*; 1 *B. Mon.*, 368; *Clarke & Jones*, 16 *B. Mon.*; *Sutton vs. Menson*, 6 *Ib.*; 4 *Mon.*, 517-18; 7 *Dana*, 140.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

This is an action, by ordinary proceedings, to recover the possession of a tract of land, the legal title to which the appellees, the Stewarts, allege they hold by devise from William Robertson.

The will of said Robertson was probated in the county of Augusta, Virginia, in January, 1832; and the land in controversy was granted to him, upon a commissioner's certificate

dated in 1798, by patent bearing date the 24th of January, 1857, more than 30 years after his death.

By an act of the Legislature it is declared, that when a patent has issued or shall issue, or a deed shall be made, to a person who is dead at the issuing of the patent, or the making of the deed, the heirs of such patentee shall take, hold, and enjoy the title to the estate so patented or conveyed, as if such patent had issued, or deed had been made, to such heirs by name. (2 vol. Rev. Stat., page 1.)

Although the appellees, the Stewarts, by the will of William Robertson, were invested with such interest in or title to the lands as he had at his death, still, as he never had the legal title, but, upon the issuing of the patent it vested in his heirs by virtue of the statute, *supra*; and, as it is not alleged that said Stewarts are the heirs of the patentee, the case, as presented, is not such as the common law judge has jurisdiction of.

Under the will of the testator, we are of opinion that his heirs hold the title which they acquired by the patent, in trust for the benefit of his devisees. The heirs, however, were necessary parties.

The case, as presented, being one of exclusively equitable jurisdiction, it was the duty of appellees to have amended their pleadings, and moved the court to transfer the action to the proper docket. (Sec. 7, Civil Code.)

It may be proper to remark that, in order to avail himself of the error of the court in overruling his motion to require appellees to verify their petition upon oath, appellant should at the time have excepted to the opinion, which was not done.

Other errors complained of we do not deem it necessary now to notice, as the pleadings and proof may be materially changed upon a subsequent trial.

But, for the reasons herein stated, the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

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CASE 14—MOTION—JUNE 19.

Thompson, &c. vs. Healy.

APPEAL FROM MARION COUNTY COURT.

1. Notice of a motion against a sheriff and his sureties, for failing to pay a county creditor a claim due him, must—where the claim is ordered to be paid by the court after the county levy for the year has been imposed,—aver that there was in the hands of the sheriff a sufficient sum to pay the claim, after deducting the previously allowed claims. But it is not necessary, when the claim is ordered to be paid at the time the county levy for the year is imposed, to aver that the sheriff had collected a sufficient sum to pay it and all other claims allowed at the same time.

2. The imposition of the county levy, and the delivery to the sheriff of the lists of the persons chargeable therewith and of the debtors and creditors of the county, as required by law, render him *prima facie* liable, on the 1st of October, to those whose claims were ordered to be paid at the time the levy was imposed.

3. On the trial of a motion against the sheriff and his sureties for failing to pay a county creditor a claim due him, the record, containing the list of claims, may be read in evidence, and it may be proved by the clerk that he delivered a copy thereof to the sheriff, without producing the list delivered to him.

4. In such proceeding, the plaintiff must aver in his notice and prove every fact necessary to show that the sheriff is liable. (18 B. Mon., 621; 3 Met., 347.) It must be averred that the clerk had delivered to the sheriff a list of the persons chargeable with the payment of county levy, and the sum to be paid by each, and a list of the sums due, and from whom due, to the county.

5. In such case, also, a demand upon the sheriff is necessary—a demand upon the deputy is not sufficient. But—

6. If no demand can be made upon the sheriff, the creditor can recover from his sureties the debt, without damages, in an ordinary action, upon showing that the sheriff collected or might, with due diligence, have collected a sufficient sum to pay the county creditors. *Argu.*

BARNETT & NOBLE, for appellants, cited *Rev. Stat.*, chap. 26, secs. 5, 6; 1 *Greenleaf's Evidence*, chap. 9, secs. 86–7–8; 3 *Met.*, 348.

ROUNTREE & FOGLE, for appellees, cited *Rev. Stat.*, chap. 26, art. 2, sec. 6; 18 B. Mon., 621; *Civil Code*, secs. 15, 16.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

This was a proceeding, by motion, in the Marion county court, against the sheriff and his sureties, for failing to pay certain claims which, it is alleged, had been allowed to Healy by said court.

1. It is contended that the notice of the motion is defective, because it fails to aver that there was in the hands of the sheriff a sufficient sum to pay Healy, after deducting the previously allowed claims.

Such an averment is necessary in a proceeding by a creditor whose "claim is ordered to be paid by the court, after the county levy for the year has been imposed." (*Rev. Stat., chap. 26, art. 3, sec. 3; 18 B. Mon., 620.*) But such an averment is not necessary in a proceeding by a creditor, whose claim is ordered to be paid at the time the county levy for the year is imposed. It is the duty of the court, annually, to impose a sufficient levy to pay all the existing liabilities of the county; (*chap. 26, art. 2, sec. 2.*) and of the clerk to deliver to the sheriff a list of the persons chargeable with the payment of the levy and of the debtors to the county, and also a list of the creditors of the county; and of the sheriff immediately to proceed to collect the levy and the debts due to the county, and pay the same to the county creditors; (*Id., sec. 5.*) and "if the sheriff or collector of county levy shall fail to pay or satisfy the county creditors, whose names are furnished him by the clerk, the claims due them respectively on or before the first day of October in each year, if demanded of him, he and his sureties, their heirs, devisees and personal representatives, should be jointly and severally liable to such county creditor for his demand, with ten per centum upon the amount due." (*Id. sec. 6.*)

The notice avers that Healy's claim was ordered to be paid at the time that the levy was imposed. In our opinion, he was not bound to aver that the sheriff had collected a sufficient sum to pay it and all other claims allowed at the same time. The imposition of the levy and the delivery of the lists to the sheriff, as required by the statute, rendered him at least *prima facie* liable for the demands of the creditors, on the 1st of October. Whether or not he could, in any case, after demand properly made, escape liability, by showing that he had not been able, with due diligence, to collect a sufficient sum to pay the creditors, need not now be decided.

2. It is contended that there was no legal evidence that the list of the county creditors was delivered to the sheriff by the

clerk of the county. The record of the court, containing the list, was read to the jury, and the clerk testified that he had delivered to the sheriff a copy of the list, containing the claim allowed to Healy. But it is contended that the clerk's statement was incompetent evidence, as no effort had been made to produce the list delivered to the sheriff.

We are of a different opinion. The record, which was read to the jury, furnished the best evidence of the list. The statute does not require any entry of record concerning the delivery of the copy to the sheriff. The delivery cannot be proved except by oral testimony. The clerk's statement was, therefore, competent evidence of the delivery. It must be presumed that he did his duty and furnished a true copy. If he did not, the sheriff can protect himself against injury by producing the copy furnished.

3. But the notice is defective in failing to aver that the clerk had delivered to the sheriff "a list of the persons chargeable with the payment of the county levy, and the sum to be paid by each, and a list of the sums due and from whom due to the county." The delivery of these lists was necessary in order to make the sheriff liable. The plaintiff must aver and prove every fact necessary to show that the sheriff is liable. (18 B. Mon., 627; 3 Met., 347.)

4. There was evidence conducing to prove a demand by Healey upon one of the sureties, but no evidence of a demand upon the sheriff.

The proceeding by motion, for the debt and damages, being a statutory remedy, cannot be maintained unless the provisions authorizing it have been complied with. For this purpose a demand upon the sheriff is necessary.

It is suggested by counsel, that the sheriff has joined the Confederate army, and that no demand can be made upon him. If so Healy can, no doubt, recover from his sureties the debt, without damages, in an ordinary action, if he can show that the sheriff collected or might, with due diligence, have collected a sufficient sum to pay the county creditors.

The judgment is reversed, and cause remanded with directions to dismiss the motion without prejudice.

CASE 15—DISTRESS WARRANT—JUNE 23.

Pegard vs. Kellar.

APPEAL FROM THE JEFFERSON COUNTY COURT.

1. A defendant in a distress warrant, who executes the bond authorized by *section 721 of the Civil Code*, thereby admits that he is either tenant, assignee or undertenant, and cannot, in a motion for judgment thereon, rely upon a defense which denies that character—as that he was but surety for the lessee, and that the lease was procured by fraud or mistake on the part of the lessor. The defenses allowed in such motion are prescribed in *section 722 of the Code*.

2. *Quere.* In the case *supra*, would not the party be entitled to relief in equity?

N. WOLFE, for appellant, cited *Civil Code, secs. 120, 121, 122; Rev. Stat., chap. 56, art. 2, sec. 9; 2 Black. Com., side page 41.*

HARRISON & BENNETT, for appellee, cited *2 Revised Statutes, page 92.*

CHIEF JUSTICE DUVAL DELIVERED THE OPINION OF THE COURT:

Kellar sued out a distress warrant against Pegard, Gorin and Schlieder for the recovery of rent alleged to be due and in arrear, amounting to \$145.83. The warrant having been levied on certain property of Pegard, he executed the bond authorized by *section 721 of the Civil Code*, which bond, under the statute regulating the jurisdiction of the Jefferson county court, was returned to the clerk's office of that court. Kellar, after regular notice, moved for judgment on this bond, which was resisted by Pegard on three grounds, the only one of which that had he noticed was, that he was never the tenant or undertenant of Kellar, or assignee of such tenant, and that the property levied on was never on the leased premises; that Gorin was the lessee and tenant of Kellar, and that he, Pegard, signed the lease, believing that he was signing it as surety only for Gorin, and that by mistake or fraud on the part of Kellar, in drawing said lease, his name was inserted therein as one of the lessees, instead of surety for the actual lessor, Gorin.

The court below rendered a judgment in favor of Kellar for the amount claimed in the warrant, notwithstanding the

special verdict of the jury sustaining this ground of defense. From that judgment Pegard has appealed, insisting that although he may be held liable as the surety of Gorin in an action on the lease, his liability cannot be enforced by distress warrant under the statute.

Without deciding that point, we proceed to consider, briefly, a preliminary question on which the decision of this case must turn.

Chapter 6 of title 14 of the Civil Code, regulating "proceedings upon executions and distress warrants," provides, among other things, the mode in which a claim to personal property, which has been levied on under an execution or distress warrant, may be asserted by "any person *other* than the tenant, his assignee, or under-tenant;" and it also prescribes the mode in which the tenant, his assignee or under-tenant may protect himself against an illegal distress. (*Sections 721 to 726 inclusive.*) Under these sections, "*the tenant, his assignee or under-tenant*" may, where an officer levies, or is about to levy upon property, execute a bond containing certain stipulations, and to be returned to a justice of the peace or clerk's office, according to the amount. The party to whom the bond is executed may move the court or justice for a judgment thereon against all or any of the obligors or their representatives, having given to them five days' notice of the motion. "The defendants may make defense upon the ground that the distress was for rent not due in whole or in part, or was otherwise illegal; or, if the property was levied on, that it was by statute exempt from levy." Other sections prescribe the mode of trial, form of the judgment, &c.

It will be observed that this summary remedy for contesting the legality of the distress for rent is confined exclusively to three classes of persons: the tenant, the assignee, and the under-tenant. For all others who may suffer injury by a wrongful or illegal levy of a distress for rent, the law has provided other and ample means of redress.

The appellant, by way of availing himself of this remedy, executed the bond required by the 721st section, thereby admitting, by necessary implication, that he was either tenant, as-

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signee, or undertenant. For, unless he sustained one or the other of those relations to the plaintiff, he had no shadow of right to give the bond or to suspend thereby the execution of the distress warrant. Yet, upon the motion for judgment on the bond, he proceeds to make defense upon the ground that he never was the lessee or tenant of the plaintiff, but executed the lease as the surety of the lessee and tenant, and that the lease was procured by fraud or mistake on the part of the lessor. It is perfectly clear, we think, that this defense was properly disregarded by the court below. It was a denial of the character in virtue of which, alone, the statute, whose aid he invoked, allowed him the right to suspend or resist the execution of the distress warrant in the mode of proceeding adopted. Whether upon the facts alleged and proved he might not have been entitled to relief in equity, is a question not before us, and, therefore, not decided.

The judgment is affirmed.

80	520
4m	908
92	544

CASE 16—PETITION ORDINARY—JUNE 24.

Matson vs. Matson.

APPEAL FROM THE BOONE CIRCUIT COURT.

1. The provision of *section 49 of the Civil Code*, that where the action concerns the separate property of the wife, or where the action is between herself and her husband, *she may sue alone*, relates merely to the form of procedure, and confers no new right of action.

2. The only effect of the provision *supra* is to dispense with the necessity for the intervention of a next friend, where the action concerns the separate property of the wife or where she sues in equity to enforce some equitable right against the husband.

3. The wife cannot sue the husband to recover possession of slaves devised to her as her separate property, free from the control of her husband, which he refuses to deliver to her; no other ground of relief, legal or equitable, being alleged.

4. In such case the husband is regarded as the trustee of the wife, holding the legal title for her sole use. A court of equity would hold him accountable for any

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violation of his trust. But his mere possession of the slaves, nothing else appearing, is not sufficient to show such abuse.

5. Although there are cases in which a court of equity will lend its aid in the adjustment of conflicting claims arising between husband and wife with respect to their property, yet is the policy of the law rather to restrict than to enlarge this class of cases. The necessity must be made clearly apparent.

JAMES O'HARA, Jr., for appellant, cited, *Rev. Stat., chap. 47, sec. 17*; 12 *B. Mon.*, 329.

STEVENSON & MYERS, for appellee, cited *Civil Code, secs. 49, 55, 58*; 18; *B. Mon.*, 385 *Ib.*, 301; 12 *Ib.*, 329; 14 *Ib.*, 247; 8 *Code N. Y. Rep.*, 265; 17 *Ib.*, 514; 31 *Barbour*, 319; 29 *Ib.*, 516; 4 *Mich.* 305; 3 *California*, 312.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

This was an ordinary action brought by Susan D. Matson vs. W. D. Matson, in the Boone circuit court, to recover the possession of two slaves which, the plaintiff alleges, were devised by the will of her father to her separate use, and which are in the possession of the defendant, who refuses to deliver them. She also, by appropriate affidavit claimed the immediate delivery of the slaves, as provided by *section 207* of the Code.

The defendant answered, setting up two grounds of defense. *First*, that the plaintiff is a married woman, the wife of the defendant, and was such at the institution of the suit; and that the legal title to the slaves is in him, as the trustee of his wife. *Second*, that before the institution of this action, the plaintiff had brought suit against him in the Kenton circuit court for the same slaves, which was then still pending.

The plaintiff's demurrer to the answer was sustained, and the defendant failing to answer further, judgment was rendered against him for the slaves, to reverse which he has appealed.

The right of the appellee to maintain this action, and to the relief granted her by the judgment, is conferred, as her counsel insist, by *section 49 of the Civil Code*, which provides that "where a married woman is a party, her husband must be joined with her, except that where the action concerns her separate property, she may sue alone, and where the action is between herself and her husband, she may sue or be sued alone."

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It is clear, however, that this provision relates merely to the form of procedure in the cases mentioned, and is but a substantial re-enactment of the pre-existing rules of practice, except in a single particular. Formerly the general rule was that where the wife was a party, either plaintiff or defendant, it was necessary that the husband should be joined with her.

But in a suit by the wife concerning her separate property, the approved practice was for her to sue as sole plaintiff, by her next friend, making the husband a party defendant. (*Story's Equity pleadings*, sec. 63.) So, in a suit in equity by the wife to enforce some equitable right against her husband, as she could not act under his advice or protection, she was allowed to seek the protection of some other person, in whose name, as her next friend, the bill was exhibited. (*Ib.* 61.)

To dispense with the necessity for the intervention of a next friend where the action concerns the separate property of the wife, or where the action is between herself and her husband, was the only object of the section referred to; and such is its only effect. It confers no new right of action.

On what principle, then, is the right of the wife to recover, as against her husband, the possession of the slaves in contest in this action to be maintained? It is true that by the will of her father the slaves were devised to her, for her separate use, free from the control of her present or any future husband. But, for aught that appears in the record to the contrary, the parties were, at the time this suit was commenced, and the judgment rendered, living harmoniously together, as husband and wife.

The natural and legal presumption that they are so living together is not repelled by the mere statement in the petition that she resided in Kenton county, and that he had possession of the slaves in Boone county. His possession of the slaves there may have been for a temporary purpose, and certainly does not of itself authorize the deduction that he resides there. His residence must be regarded as her residence, in the absence of any explicit averment to the contrary.

Nor is it alleged, or even intimated, in the petition, that the possession of the slaves by the defendant is in any way injur-

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ious or prejudicial to her rights as beneficial owner. The case as presented by the record is simply that of a wife suing the husband for slaves belonging to her, and the possession of which he refuses to deliver to her, no other ground of relief, legal or equitable, being suggested.

Should either a court of law or equity grant relief in such a case? It seems to us that the most obvious considerations of public policy, to say nothing of the reciprocal rights and duties pertaining to the relation subsisting between the parties, furnish a conclusive response to this question. For, although there are cases in which a court of equity will lend its aid, in the adjustment of conflicting claims arising between husband and wife with respect to their property, yet it is the policy of the law, founded on a just regard to the repose and sanctity of domestic life, rather to restrict than enlarge this class of cases. The necessity must be made clearly apparent before the aid of the chancellor can be successfully invoked by either party.

In the present case, the husband must, upon well settled principles, be regarded as the trustee of the wife, and is clothed with the legal title to the slaves for her sole use, having himself no beneficial interest, according to the terms of the will which created the separate estate. Such being his attitude, a court of equity would undoubtedly hold him accountable for any violation of his trust in unconscientiously depriving the *cestui que trust* of any substantial right conferred on her by the will under which she claims. But is the mere possession of the slaves by the husband and trustee, without any explanation of the manner in which he acquired the possession or of his motives and objects in retaining it, such an abuse of his trust as would authorize the interposition of the chancellor? We think not. The legal presumption is, that his possession of the slaves was consistent with her rights and interests, and that they were retained and used by him for her benefit.

This, however, was not a proceeding in equity, but, as already shown, an ordinary action, the plaintiff claiming the immediate delivery of the property under the provisions of the Code regulating the proceedings in such cases. It is hardly necessary to add that, if she had a right of action at all against

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her husband, it could only have been asserted in equity. And as her petition failed to set out any equitable ground of relief, the first and second paragraphs of the answer presented a sufficient defense to the action.

It has not been deemed necessary to notice the several authorities relied on by counsel for the appellee. It is sufficient to say that none of the cases cited are in point, and that they wholly fail to sustain the position contended for. In *Van Sickie vs. Van Sickie*, (*Howard's Practice Rep.*) the sole question was upon the construction of that provision of the New York Code which authorizes the submission of an agreed case to the court. It is distinctly stated in the opinion, that the court were not called on to decide whether the action was properly brought, or could have been maintained on the facts agreed. The case in 29 *Barbour*, 512, merely decides that husband and wife cannot, under the Code, maintain an action in their joint names to recover for the conversion of the separate property of the wife, but that she must sue alone.

The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer to the first and second paragraphs of the answer, and for further proceedings not inconsistent with this opinion.

CASE 17—PETITION ORDINARY—JUNE 25.

White vs. Booker.

APPEAL FROM THE SHELBY CIRCUIT COURT.

1. The intention of the parties, to be gathered from the entire instrument—not the meaning or effect of a particular word—must always determine the question of construction of the contract.

2. After reciting that B. had bought of W. 100 hogs, of a certain description, to be delivered at the time, place and price specified, the agreement stipulates that "B. feeds and returns him, W., 250 hogs, no hog to weigh less than 220 pounds, and each and every hog to be well fatted, and no sow with pig, and to average 300 pounds gross." *Held*, That hogs fed by others than himself, of the requisite description, might be furnished by B. in fulfillment of his contract.

In this action, brought by Booker against White, to recover damages for the refusal of the latter to receive and pay for the 250 hogs mentioned in the contract, when tendered, the defense set up was, in substance, that said hogs were all to be fed solely by the plaintiff, and none other, and that the larger portion of the hogs tendered by plaintiff were not of his feeding, but were purchased, already fatted, of other persons; and that plaintiff did not tender him 250 hogs of his own feeding, &c.

A demurrer was sustained to the answer, verdict and judgment for the plaintiff for \$1,700 damages, and the defendant appeals.

T. B. & J. B. COCHRAN, for appellant, cited 5 *B. Mon.*, 501.
J. M. & W. C. BULLOCK, for appellee, cited 1 *B. Mon.*, 7.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

The contract in the case of *Shultz vs. Johnson's adm'r.*, (5 *B. Mon.*, 497,) was held to be a personal contract, which did not survive to the administrator, on the ground that such was the intention of the parties, clearly manifested by the terms of the writing. It was said that hemp, which was the subject of that contract, was an important and valuable staple, and the court had a right "to presume that its value greatly depends upon

the attention, experience and skill in raising and preparing it for the use of the manufacturer.

But here neither the terms of the contract, nor its subject matter, nor the situation of the parties, authorize any such construction. After reciting that Booker had bought of White 100 hogs, of a certain description, to be delivered at the time, place and price specified, the agreement stipulates that "Booker *feeds* and *returns* him, White, 250 hogs, no hog to weigh less than 220 pounds, and each and every hog *to be well fattened*, and no sow with pig, and to average 300 pounds gross."

Now, if Booker had ready for delivery, at the time and place specified, the 250 hogs, coming up in all respects to the description contained in the writing, it would hardly be rational to assume that, whether they were fed by Booker or by another, was or could be, a matter of the slightest concern to the purchaser. This court, at least, could not presume that the market value of 250 hogs, averaging 300 pounds, and well fattened, would greatly or at all depend on "the attention, experience and skill" which may have been displayed in fattening them. We think it clear, therefore, that the recital or stipulation that "Booker *feeds*," was immaterial, and formed no part of the essence or substance of the agreement in the estimation of the parties themselves. Moreover, the literal construction contended for would render the performance of the contract by Booker impossible, because he not only agreed to *feed* but to *return* to White 250 hogs. But he had received from White only 100 hogs, and could, therefore, only have *returned* that number, according to the strict literal meaning of the word. The intention of the parties, to be gathered from the entire instrument, not the meaning or effect of a particular word, must always determine the question of construction.

The judgment is affirmed.

CASE 18—IN EQUITY—JUNE 25.

4mc200
94 108

Wells et al vs. Lewis et al.

APPEAL FROM THE CLARKE CIRCUIT COURT.

1. Where a testator directs land to be sold by his two executors, and one of them vacates his office, the power to sell devolves on the other. (*Rev. Stat., chap. 37, art. 1, sec. 9.*) If both remain in office, the power is joint, and both should execute the deed. (*4 Mon., 582.*)

2. Where a sale and conveyance of land, made by one of two executors, is a nullity, and, therefore, the notes executed by the purchaser are without consideration, it cannot be rendered valid, without the consent of the purchaser, by tendering to him the deed of the person to whom the land and its proceeds were devised.

3. Where two executors were authorized to sell land, a purchaser from one of them who, at the time he executed the notes for the purchase money, for the purpose of enabling the executor to sell them, executed and delivered to him a paper stating that he expected to pay the notes at maturity, and had no offsets and would have none against them, is estopped, (when sued by an assignee who purchased them upon the faith of it,) from pleading that the notes are without consideration.

4. When the law presumes *prima facie* that an act was done with a certain intention, a denial of such intention is unavailing; the facts relied on to destroy the presumption must be stated. Thus, where a purchaser of land, at the time he gave his notes therefor, executed a paper stating that he expected to pay the notes at maturity, and had no offsets, and would have none against them, a denial by him that he executed them for the purpose of enabling the vendor to sell them, is insufficient to throw upon an assignee of the vendor, in a suit upon the notes, the burthen of proving such intention; but the defendant should show for what purpose they were executed.

5. That, in the case, *supra*, the assignor of the notes, before he sold and assigned them, showed said paper to the assignee and delivered it to him, who retained possession of it, *held* sufficient to prove that he bought the notes on the faith of it.

6. Where land is devised to three devisees, and directed to be sold and the proceeds divided between them, each holds the legal title to a third of the land, subject to be divested by a sale as directed by the will. They may, by agreement, elect to keep the land; or, either of them may require a sale of it, as directed by the will, and a distribution of the proceeds. Neither of them can acquire an indefeasible right to a third of the land, without the consent of the others. (*4 Madd. Ch'y. Rep., 484; 2 Bro. C. R., 497; 3 Wheat, 563.*) A vendee of one of them may exercise the same rights as his vendor.

7. A writing purporting to have been executed by the defendant, referred to in and filed with plaintiff's reply to his answer and cross petition, may be read as genuine against him, unless he denies its genuineness by affidavit before the trial is begun. (*Civil Code, sec. 588.*)

HUSTON & BUSH, for appellants, cited 2 *Johnson's Ch'y. Rep., 77; 3 J. J. Mar., 244-5; 3 Dessan's Ch'y. Rep., 417; Sugden on*

Wells et al vs. Lewis et al.

Powers, 114 to 121; 1 *Story's Eq.*, secs. 170 to 175; 2 *Dana*, 82-3; *Pr. Dec.*, 224; 4 *Mon.*, 73; 2 *J. J. Mar.*, 223.

GEO. SMITH and JAS. FLANAGAN, for appellees, cited 2 *Johnson's Ch'y. Rep.*, 21; 2 *Dana*, 76; 2 *J. J. Mar.*, 223; 2 *Dana*, 99; *Rev. Stat.*, chap. 25; 1 *Met.*, 306; *Hardin*, 421; 4 *Mon.*, 73.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Matthew Thompson, who died in 1839, devised a tract of land, in Clarke county, to M. N. Thomson, M. F. Thompson, Haynie Thomson, and W. I. Thomson, all of whom were infants; and directed his executors to rent out the land until the youngest of the devisees should attain the age of 21 years, and divide the rents between them; and to sell the land when the youngest should attain the age of 21 years, and divide the proceeds between them, or the survivors then living; and he appointed James L. and Sanford Thomson executors of the will, both of whom qualified in 1839, in the county of Clarke. James L. Thomson left Kentucky and ceased to act as executor in 1841 or 1842, and has continued to reside out of the State. The other executor, Sanford Thomson, has continued to the present time to act as executor in renting the land and in other matters. The youngest devisee became of age in the spring of 1859. Before that time, one of them, M. F. Thompson, died, whereby the right to the land and proceeds vested in the other three. On the 11th July, 1859, said James L. Thompson, "as one of the executors" of said Matthew Thompson, executed a deed to the appellants, purporting to convey to them an undivided third part of said land, which is described as the interest of Haynie Thompson therein; and the appellants executed their notes for the purchase money, payable to said James L. Thompson, who assigned the same to the appellee, Lewis. When the notes fell due the appellants refused to pay them, upon the ground that they had discovered that James L. Thompson's deed gave them no right to the land. Lewis then procured a deed from the devisee, Haynie Thompson, conveying to the appellants a third of said land, but they refused to accept the deed or pay the notes. Lewis then brought this suit, asking for a judgment against the appellants

for the amount of the notes, and for a sale of their interest in the land, to satisfy the same.

The appellants answered that they had obtained no title to the land, and, therefore, that the notes were without consideration; and made the answer a cross-petition against Lewis and the Thompsons, and asked for a rescission of the contract and for a cancellation of their notes. *† e*

Lewis filed a reply, insisting that the appellants had good title to the land, and also alleging that, when they executed the notes for the purpose of enabling Thompson to negotiate them, they signed and delivered to him a paper of which the following is a copy:

“CLARKE COUNTY, KY., July 12, 1859.

We purchased a tract of land of J. L. Thomson, as executor of Matthew Thomson, dec'd., of 84½ acres, and gave our notes for it in two payments, and we expect to pay them when they fall due. We have no offsets, nor will have, on those notes.

WM. D. STEVENSON,
A. STEVENSON,
F. J. WELLS.”

And that said paper was presented to him before he purchased said notes, and that he was thereby induced to purchase them.

The court below rendered a personal judgment against the appellants for the amount of the notes, from which they appeal; whilst the appellee complains, upon a cross appeal, because the court failed to order a sale of a third of the land.

In our opinion, J. L. Thomson's deed passed no title to the land. Whether or not, by ceasing to act, and by residing out of the State, he had vacated his office as executor, we need not decide. If he had vacated the office, the power to sell devolved on the other executor. (*Rev. Stat., chap. 37, art. 1, sec. 9.*) If he had not vacated it, the power was joint, and both executors should have signed the deed. (*Halbert vs. Grant*, 4 Mon., 582.)

The notes given by the appellants were, therefore, without consideration; and the contract of purchase being a nullity, Lewis had no power to render it valid, without the consent of

the appellants, by tendering to them the deed from Haynie Thomson, even if he could have conveyed a good title in fee.

But, in our opinion, the appellants are estopped from pleading in this case, that the notes are without consideration. The pleadings and evidence show that they executed and delivered to J. L. Thomson the paper before mentioned, to enable him to sell their notes, and that Lewis purchased the notes upon the faith of it. Though, in legal contemplation, a set-off is a different thing from a matter of defense, the distinction is not perhaps perfectly understood by many unprofessional men. And, in view of the purpose for which the paper was given to J. L. Thomson, and of its statements, that the appellants expected to pay the notes at maturity, and had no offsets and would have none against them, our opinion is that they intended to produce the impression that they would present no defense to the notes, and that Lewis had a right to regard the paper as so stating, in substance. If the appellants, when they gave the paper to Thomson, contemplated a defense, in case the title should prove defective, they acted in bad faith in giving him the paper, which, if such was their purpose, was delusive and designed to deceive and to enable Thomson to commit a fraud by getting a fair price for worthless notes. If such was their purpose, they should not be permitted to carry it into effect. The personal judgment against the appellants was therefore right.

We have said that the pleadings and evidence show that the appellants executed and delivered to J. L. Thomson the paper before mentioned, to enable him to sell their notes, and that Lewis purchased the notes upon the faith of it. These propositions being controverted by counsel, we will refer to the pleadings and evidence by which we regard them as established.

Section 598 of the Code declares that, "where a writing, purporting to have been executed by one of the parties, is referred to in, and filed with a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun." The paper in question was referred to in, and filed with, Lewis' reply, and its genuineness

ness was not denied by the appellants. Moreover, the execution and delivery of it to J. L. Thomson were proved by Flanagan's deposition, as we shall presently show.

The paper having been again referred to in an amended petition of Lewis, the appellants, in an amended answer, denied that it was given for the purpose of enabling Thomson to sell the notes, and no evidence was introduced to prove the purpose for which it was given. But such evidence was unnecessary. It must be presumed, *prima facie* at least, that it was given for that purpose, such being its apparent natural import. When the law presumes, *prima facie*, that an act was done with a certain intention, a denial of such intention is unavailing; the facts relied on to destroy the presumption must be stated. Thus, a denial by a married woman that she signed a note with the intent to bind her separate estate, was held to be insufficient to throw upon the plaintiff the burthen of proving the intention. (*Eastin vs. Fulwiler, Mss. Opin., Feb., 1857.*) If the appellants did not execute the paper to enable Thomson to sell the notes, they should have shown for what purpose it was executed.

Flanagan testifies, that J. L. Thomson stated to him, not only that he had obtained from the appellants the paper in question, but "that he showed the same to Lewis before he sold and assigned him the notes, and that he had given said Lewis said writing." We regard these facts, in connection with Lewis' possession of the paper, as sufficient to prove that he bought the notes on the faith of it.

Flanagan's evidence, as to Thomson's statements, should have been excluded if it had been objected to. But having been read without objection, it must be regarded, in the absence of opposing evidence, as sufficient proof of the facts stated by Thompson.

As the appellants have no title to the land, the circuit judge was right in failing to order a sale of it to pay the notes.

But as Haynie Thomson's deed to the appellants was executed in consideration of said notes, and for the purpose of perfecting their title to a third of the land, they may now accept the deed and thus acquire his interest.

 Green vs. Goodrum, &c.

He holds the legal title to a third of the land, subject to be divested by a sale as directed by the will. If he had been the sole devisee of the proceeds, he might have elected to take the land instead of the proceeds. But each of his co-devisees has a right to require a sale of all the land and a distribution of the proceeds. Neither of them can acquire an indefeasible right to a third of the land without the consent of the others. (*Smith vs. Claxton*, 4 *Madd. C. R.*, 484; *Fletcher vs. Ashburner*, 1 *Bro. C. R.*, 497; *Craig vs. Leslie*, 3 *Wheat*, 563.) They may, by agreement, elect to keep the land, or either of them may require a sale of it, as directed by the will, and take a third of the proceeds. These rights may be exercised by the appellants, if they should accept the deed from Haynie Thomson.

As that deed was made in consideration that the appellants should pay the aforesaid notes, Lewis, if they should accept the deed, will have a lien upon their interest in the land, and an equitable right to require a sale of it and an application of a third of the proceeds to the payment of the notes.

The judgment is affirmed on the original and cross appeals.

 CASE 19—MOTION—JUNE 25.

Green vs. Goodrum, &c.

APPEAL FROM THE MARION CIRCUIT COURT.

1. An entry by the clerk of the circuit court, in the execution book, that the execution was delivered to the sheriff, cannot be impeached by parol testimony in a motion against the sheriff and his sureties for not returning the execution within thirty days of the return day. Such entry is conclusive in all collateral proceedings. (*Rev. Stat.*, art. 1, sec. 4; 3 *Starkie's Ev.*, 1042; 13 *Serg. & Rawle*, 254; 2 *Walt & Serg.*, 337; 12 *Gratten*, 277; 4 *Dana*, 566; 3 *Bibb*, 356.)

2. See opinion for a discussion of the principle, *supra*, and examination of the authorities.

M. R. & T. B. HARDIN, for appellant.

JUDGE WILLIAMS DELIVERED THE OPINION OF THE COURT:

This is a motion against the sheriff, Goodrum, and his sureties, for not returning, within thirty days of the return day, the execution of Green vs. Purdy, which issued from the Marion circuit court clerk's office. The sheriff sets up, as a defense, that no such execution came to his hands.

The execution book, kept by the clerk, shows that an execution was issued, "No. 1,100, J. Green, assignee, vs. H. W. Purdy, *fi fa* \$150—debt, interest from 26 May, 1858, \$6.70, cost, judgment May term, 1858, date June 17, 1858, return day 4th Mo. July, 1858, delivered to Goodrum."

The parol evidence tends strongly to prove that the clerk issued the execution, and put it in a rack in his office where the sheriff usually found the executions; that lawyers and litigants had free access to said rack, and frequently took papers therefrom; that, by some unexplained casualty, this execution did not in fact come to the sheriff's hands.

Can this evidence be received to impeach the verity of the execution book?

Sec. 4, chap. 17, title Clerks, 1st Stan. Rev. Stat., 247, enacts that, "He shall keep a book in his office, in which he shall enter the names of the plaintiffs and defendants, the amount, and from what period the same bears interest, the date and return day, and to whom delivered, and when returned, of every execution which may issue from his office."

When this case was before this court on a former appeal, the judgment dismissing the motion was reversed, because, as this court then said, on the evidence then before them, "a stronger *prima facie* case against the sheriff could not well have been established." The question we are now considering was not made or decided by this court at that time.

"Courts of record speak by means of their record only, and even where the transactions of courts, which are not, techni-

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cally speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes. And it seems that, in general, when the law authorizes any person to make inquiry of a judicial nature, and to register the proceedings, the written instrument, so constructed, is the only legitimate medium to prove the result." (3 *Starkie's Ev.*, 1042.)

Where a recognizance, purporting to be entered into before Alex. Ogle, prothanotary, in a case to obtain a *certiorari* from the judgment of a justice of the peace to the court of common pleas, defendant offered to prove that the whole instrument was in the handwriting of the prothonotary's father, and that the father was not a regular deputy, but only employed to write for his son occasionally; yet the supreme court of Pennsylvania rejected the testimony. (*Patton vs. Miller*, 13 *Serg. & Raw.*, 254.) In the subsequent case of *Coffman vs. Hampton*, (2 *Watts & Serg.*, 387,) the same court, on an appeal from a judgment of a justice of the peace, held that the justice could not be allowed to testify "what the cause of action was before him in the case of *Hampton vs. Coffman*," nor "whether his docket set forth precisely the cause of action;" because, continues the court, "the docket of the proceedings before the justice showed explicitly that the action was brought to recover a deficiency in a sale for account of a former purchaser. This was the best evidence, and parol evidence was not admissible to contradict or vary it."

In the case of *Taliaferro et al vs. Pryor*, (12 *Grattan's Reports*, 277,) the appellate court of Virginia, under a statute of that State authorizing the several clerks, when their record should be destroyed by any means, upon the production to him of the original writing so recorded, or a copy thereof, duly attested, &c., to record the same again, *held*, after the destruction of the office and papers by fire, that the clerk, having admitted to record a paper purporting to be duly attested by his predecessor in office, it could not be attacked, in a collateral proceeding, by showing that the copy admitted to record was not attested by the former clerk or any authorized deputy.

The Kentucky statute of 1815, regulating treasury warrant claims, provides that the *actual survey* shall be considered the commencement of the title, if registered within one year; if not, then from the time when registered. The surveyor made a survey for Flynn on 11th March, 1829, but which was not registered until 15th January, 1831, and patented 13th July, 1831. Cain obtained a certificate of survey from the same surveyor, for the same identical land, 11th March, 1830, had it registered within a year, and patented 11th April, 1831. As Cain's patent related back to 11th March, 1830, and Flynn's only to 15th January, 1831, when he registered his survey, Cain's title was the elder. The surveyor was introduced, and testified that he had never made an actual survey for Cain, but furnished him with a certificate of survey from the field notes made at the time he executed Flynn's survey. This court rejected the testimony, remarking, "that principle and policy both forbid that written instruments, made by authority of law, or the compact of parties, the permanent repositories and testimonies of truth, and of the most important rights, should be subject to be impeached, contradicted, or annulled, by loose, collateral, parol testimony. The appointed agent of the law, having made out, and certifying officially, the execution of a survey which by law is made the foundation of the patent, which by law is elevated to the dignity of record evidence of title, cannot be subject to the assault of parol testimony. The best interest of society demands that it should not, and the wisdom of the law forbids it." (*Cain vs. Flynn*, 4 *Dana*, 500.)

In *Taylor vs. Commonwealth*, (3 *Bibb*, 356,) where a deputy sheriff had endorsed on an execution, "Came to hand 11th March, 1811," but afterwards erased this and endorsed, "Came to hand 24th March, 1811," and the responsibility of the sheriff depended upon whether it did come to hand before the 24th March, Tyler, the deputy clerk, was permitted to testify that the execution was delivered to the deputy sheriff on the 11th March, and an entry made on the execution docket, that it was so delivered on that day, but that some one, unknown to him, had altered the date from the 11th to 24th March on the

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execution docket; that the deputy sheriff frequently came into the office and examined the execution docket. On objection to this evidence, as contravening the record, this court held, that there was no law requiring the clerk to *note the time of delivering the execution*, and that such entry, without authority of law, did not give it the authenticity of a record; and the objection to the evidence not well taken. But, had it been otherwise, we can hardly suppose that the fraudulent alteration of a record, by an interested party, without authority of law, could make a record recognized by law, the verity of which would be unimpeachable; the evidence would show it was not a record, because of the fraudulent alteration by an unauthorized person. Or, if we should be mistaken in this, a party, as the court held in that case, would not be allowed to avail himself of his own unauthorized and fraudulent act. It is plainly to be inferred from this case, that the entry of the clerk, made in pursuance of law, should be regarded as a conclusive record.

In the case cited from Virginia, the court very properly, as we think, suggested that, if a party was injured by the careless or improper action of the clerk, he had a remedy against the clerk on his official bond, but could not attack the record in a collateral proceeding.

The obvious intention of the Legislature, in requiring the execution book to be kept, and requiring the clerk to make the entries therein, as directed, was to furnish all parties with record evidence of the action of the officers, which could be easily obtained, and which should be conclusive in its character. This record is as much for the protection of the officer and his securities as for the parties, and to the faithful, diligent officer will remain a sure protection against the imperfections and corruptions of parol testimony.

The cases cited show the solemnity and verity attached to records made by officers in the discharge of their legal official duties; and, as a great overruling public policy, such records are held conclusive in all collateral proceedings.

The statute does require the clerk to enter upon the execution book, "*to whom delivered.*" When the clerk has done this,

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it must be held as conclusive in all collateral proceedings. Should this fix on the sheriff an unjust responsibility, we, like the Virginia court, think that his remedy would be against the clerk.

As the entry on the execution book must be deemed conclusive evidence that the execution went into Goodrum's hands, it remains for him to show an excuse why it was not returned within thirty days of the return day thereof.

Wherefore, the judgment is reversed, and the cause remanded with directions for further proceedings not inconsistent with this opinion.

CASE 20—PETITION ORDINARY—JUNE 29.**Dougherty vs. Smith, Wilson & Co.**

APPEAL FROM THE FLEMING CIRCUIT COURT.

1. Where partners sue to recover a debt, one of them cannot, pending the action, transfer his interest to his co-plaintiffs and become a witness for them, by having his name stricken from the action as plaintiff and theirs substituted. *Section 32 of the Civil Code* does not authorize it.

2. Where the cause of action is transferred, pending the suit, and the name of the assignee substituted for that of the plaintiff, security should be given for the past as well as future costs.

3. That a witness is liable to judgment for costs in the action is a disqualifying interest.

W. H. CORD, for appellant, cited *Parson's Mercantile Law*, 111, 112, 115; 2 *Greenleaf*, sec. 175; 1 *Wharton's Dic.*, 702; 2 *Swunston*, 400; *Civil Code*, sec. 35; 3 *Met.*, 245; 2 *Ib.*, 517, 612; 14 *B. Mon.*, 320; *Greenleaf Ev.*, sec. 356 et seq.; *Ib.*, 391; 1 *B. Mon.*, 322; 1 *Story's Eq.*, secs. 323-4-5; 4 *John. C. R.*, 130; 3 *Maddock's Rep.*, 191; 1 *Met.*, 204; *Bayly on Bills*, 26; *Greenleaf*, secs. 389, 390, 347; 18 *B. Mon.*, 128; 1 *B. Mon.*, 322.

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WM S. BORRS, for appellees, cited *Civil Code*, sec. 32; 18 *B. Mon.*, 759; 14 *Ib.*, 321; 18 *Ib.*, 128; 4 *Dana*, 106; *Chitty on Bills*, 295-6-7, 407; 3 *Kent's Com.*, 72; 3 *Johnson*, 89.

L. M. COX, on same side, cited *Civil Code*, sec. 670, sub-div. 6; 14 *B. Mon.*, 321; 18 *Ib.*, 128; *Civil Code*, sec. 161; *Coil vs. Howard*, *Miss. opin.*, Dec., 1853.

JUDGE WILLIAMS DELIVERED THE OPINION OF THE COURT:

This was a suit by appellees, as holders, against Sousley, as acceptor, Wilson, Hicks, and Kenney, as drawers, and Dougherty, as endorser, of a bill of exchange for \$900.

Dougherty first set up a want of notice of protest for non-payment as a defense.

Judgment was rendered against the drawers and acceptor; an execution issued, a small sum was made by the sale of the drawers' property, after which Dougherty set up, as an additional defense, that, since the rendition of the judgment, the debt had been fully paid by the assignment of a whisky contract for 2,000 gallons, by the drawers to the plaintiffs; also that he was discharged by an agreement to extend further time, &c. By agreement, the cause was submitted to the decision of the court. "Plaintiffs then introduced Smith, one of the plaintiffs, who was sworn on his *vow dire*, who stated that he had no interest in the event of this suit; that such arrangements had been made between him and his co-plaintiffs that he had transferred the claim sued on to them. And, thereupon, the plaintiffs moved and offered to strike Thos. B. Smith's name from the action as plaintiff, and that plaintiffs Wilson and Allen be substituted in the action in the place of Smith, Wilson and Allen. The plaintiffs offered to give security for costs, to which defendant objected, and the court overruled the objection and sustained the motion of plaintiffs; and, thereupon, on their motion, the name of Thos. B. Smith was stricken from the action as plaintiff and the plaintiffs Nelson and Allen substituted in the action; and Hon. L. W. Andrews entered himself on the record as security for costs for plaintiffs."

Sec. 32, *Civil Code* provides that "where the right of the plaintiff is transferred or assigned, during the pendency of the

action, it may be continued in his name, or the court may allow the person to whom the transfer or assignment is made, to be substituted in the action, proper orders being made as to security for the costs." This is a discretion given to the court, as matter of convenience to the parties, and to be exercised in the furtherance of justice; but, even in a proper case, it is not imperative on the court. It never was intended to authorize a member of a firm to transfer his interest to his partners, and thereby divest himself of an interest, so as to make him a competent witness for his partners. Such partner is a necessary party to the record, either as plaintiff or defendant. Here he was made a plaintiff, and become responsible to the defendant for his costs.

Public policy does not require such a construction of this section of the Code as to permit a partner thus to divest himself of interest and become a witness; nor is it within the inconveniencies or evils intended to be remedied by the Legislature.

In *Warner vs. Turner*, (18 B. Mon., 759,) the plaintiffs had transferred their entire right of action, and the notes sued on, to Turner, without recourse. Turner, by the order of the court, was substituted as plaintiff, by becoming bound for past and future costs. This case was within the letter and spirit of said section.

Andrews only become bound for the future costs of Wilson and Allen; and even they did not undertake to indemnify Smith against the liability for past costs. If the defendant should recover judgment for his costs, he would be entitled to the same against Smith as well as against Wilson and Allen. Smith, therefore, has a direct legal interest in the result of the suit, which, however small, was sufficient to exclude him. (*Finnell vs. Cox*, 3 Met., 246.)

The court erred in striking Smith's name from the record as a plaintiff, and substituting Wilson and Allen alone as plaintiffs; also, in permitting Smith to testify in behalf of Wilson and Allen.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.

Skillman, &c. vs. Muir's Adm'r.

CASE 21—PETITION ORDINARY—JUNE 30.

Skillman, &c. vs. Muir's Adm'r.

APPEAL FROM THE BOURBON CIRCUIT COURT.

1. In an action upon a covenant to furnish a slave with winter and summer clothing, an averment that the defendant had "failed to clothe said slave properly," is not a sufficient assignment of the breach. In such case, judgment by default for the plaintiff will be reversed; but the error, if there had been an issue, would be cured by a verdict and judgment for the plaintiff.

2. In an action for damages for breach of covenant, the plaintiff must prove their value. Thus, in an action for failing to furnish a slave the clothing stipulated, an averment that it was reasonably worth a certain sum, must be supported by proof. It is error to render judgment by default without such proof.

3. Where, upon the facts stated in the petition, there is an implied assumpsit to pay the amount claimed by the plaintiff, the allegation of value need not be proved upon failure of the defendant to counteract it. (15 *B. Mon.*, 628; 18 *Id.*, 60.) Otherwise, where there is no assumpsit, express or implied, to pay the sum claimed. (14 *B. Mon.*, 399; 18 *Id.*, 216; 1 *Met.*, 558; 3 *Met.*, 196.)

4. See the opinion for a review of the authorities and discussion of the principles upon which the foregoing rulings depend.

5. The Civil Code requires only a statement of the facts constituting the cause of action. What the law implies need not be averred. (Sections 118, 144.)

G. & R. T. DAVIS, for appellants, cited 18 *B. Mon.*, 230; 14 *Id.*, 395; *Civil Code*, sec. 159; 3 *Met.*, 197.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

This was an action upon a covenant by which the appellants agreed to pay \$105 for the hire of a slave, and to furnish him winter and summer clothing, and a blanket.

The petition alleges that no part of the hire had been paid, and that the defendant had "failed to clothe said slave properly, or to furnish him a blanket," and that "the clothes said slave was entitled to, and not furnished with, and the blanket, were reasonably worth \$15."

The defendants failing to answer, a judgment by default was rendered against them for \$120, from which they appealed.

The judgment must be reversed for two reasons:

1. The breach of the covenant, concerning the clothing, is not properly assigned. Whether the ground of the complaint

is, that the defendants failed to furnish winter clothing, or that they failed to furnish summer clothing, or that the clothing furnished was not of proper quality, the petition fails to show. The petition does not show the ground of the action, nor state any fact constituting a cause of action, with reference to the clothing; the averment, that the defendants "failed to clothe said slave properly," being nothing more than an allegation of a legal conclusion. This error, if there had been an issue, might perhaps have been cured by a verdict and judgment for the plaintiff; (16 *B. Mon.*, 691;) but it is sufficient for the reversal of this judgment by default.

2. It was erroneous to render judgment for the \$15, which the blanket and clothing were alleged to be worth, without proof of their value.

The Code declares, that allegations of value, or of amount of damage, shall not be taken as true, by the failure to controvert them." (*Sec. 153.*)

This court has sustained a judgment by default, without proof of value, for the amount of a physician's account for medical services and medicine; (*Harris vs. Ray*, 15 *B. Mon.*, 628;) and a similar judgment for the amount of a merchant's account for goods sold and delivered to the defendant; (*Francis vs. Francis*, 18 *B. Mon.*, 60;) whilst it has reversed similar judgments for the value of coal taken by the defendant from the plaintiff, (*Daniel vs. Judy*, 14 *B. Mon.*, 393,) for damages committed by a trespasser upon the plaintiff's land, (*Clarke vs. Seaton*, 18 *B. Mon.*, 226,) for the value of goods, which a common carrier failed to deliver according to his agreement, (*Huston vs. Peters & Co.*, 1 *Met.*, 558,) and for the value of cash notes, which the defendant failed to assign as he had covenanted to do, (*Marr's adm'r vs. Prather*, 3 *Met.*, 196,) though in each of these cases, the amount of value or damage, for which the judgment was rendered, was alleged in the petition.

In *Harris vs. Ray*, and *Francis vs. Francis*, this validity of the judgments was apparently placed upon the ground, that the sums claimed by the plaintiffs were alleged in their petitions to be due and owing. We do not suppose, however, that

such an allegation would have releived the judgment in either of the other cases from error.

The true distinction between these two cases and the others seems to be, that in each of the former there was, upon the facts stated, an implied assumpsit to pay the amount claimed by the plaintiff, whilst there was no assumpsit, express or implied, in either of the latter, to pay the sum claimed.

Under the old practice, in an action of debt for the price of goods sold and delivered, it was not necessary to aver a promise to pay the sum claimed; (1 *Chitty's Pl.*, 362.) and, although in an action of indebitatus assumpsit for the price of goods sold and delivered, it was necessary to aver a promise to pay, it was not necessary to prove such promise; because proof of the sale and delivery of the goods, and of their value, raised a legal implication of a promise to pay the value, though no price had been agreed upon. (*Snodgrass vs. Broadwell*, 2 *Litt.*, 353; *Jenkins vs. Richardson*, 6 *J. J. Mar.*, 441.)

Under the Code of Practice, which requires only a statement of the facts constituting the cause of action, what the law implies need not be averred; (*secs.* 115, 144;) and a petition, alleging a sale and delivery to the defendant of goods worth a certain sum, or the rendition of services worth a certain sum, or containing equivalent allegations, is sufficient to authorize a judgment by default for that sum, because a promise to pay it is implied by the law. In such a case, the value of the goods, or services, need not be proved, because, in legal contemplation, the action is founded upon the defendant's promise to pay a certain sum of money.

But this action, like that in the case of *Marr's adm'r vs. Prather*, is for damages caused by a breach of a covenant. The law does not imply a promise to pay damages which the defendant has covenanted to pay. The plaintiff, therefore, should have proved the value of the blanket and clothing, or, in other words, the damages he sustained by the breach of the covenant.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CASE 22—IN EQUITY—JULY 1.

Spalding vs. Simms et al.

APPEAL FROM THE WASHINGTON CIRCUIT COURT.

1. The territorial jurisdiction of Kentucky, according to the boundary defined by the Revised Statutes, (chap. 8, art. 1, sec. 1,) has been recognized by the court of appeals. (12 Met., 394.)

2. A defendant, against whom an attachment issues, appearing and not contesting it, it must be regarded as valid. (*Civil Code*, sec. 287.)

3. The courts incline to an equitable construction of the attachment laws, so as to secure the rights of creditors, and to make the statutes remedy the evils as designed by the legislature enacting them. (10 Grat., 289; 10 Ib., 448; 10 Rich., 15.)

4. Where the debtor leaves his home, with the intention of going out of the State, and consummates this purpose, and is absent from his home pursuant to such intention for the period of four months, it must be regarded as absence from the State and ground for attachment; although some unlooked-for casualty may have delayed him a few days from passing beyond the territorial boundary of the State.

JAS. HARLAN and JAS. HARLAN, Jr., for appellant, cited *Civil Code*, secs. 221, 287, 729, 259.

M. R. & T. B. HARDIN, for appellees, cited *Samuel vs. Dalton*, *Miss. opin.*, Jan. 1857; 3 *Dana*, 579; 8 *Ib.*, 67; *Civil Code*, secs. 221, 871, 225, 226, 728, 729; *Rev. Stat.*, chap. 97.

SIMPSON & SCOTT, on same side, cited *Civil Code*, secs. 257, 221, 161, 259, 728, 729, 730; 14 *B. Mon.*, 195; *Bondurant vs. Apperson*, *ante*, p. 30; *Hanson vs. Bowyer*, *ante*, p. 108.

JUDGE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Simms, the debtor, left his house, in Washington county, some 60 miles from Louisville, on the 18th December, 1859, with stock for Mississippi and Louisiana. He expected to ship the stock on board a steamer at Louisville on the 20th December, but was unexpectedly and unavoidably detained at Louisville until the 24th December, when he embarked, with his stock, on a steamer bound down the Ohio river. He did not return to this State until about the first of the following May. From the forenoon of 21st April down to 2d May, some twenty attachments were sued out against his estate.

Appellant's attachment, for about \$10,000, came to the sheriff's hands in the forenoon of 21st April, some two or three only having been previously sued out. Several others were sued out on the same day, but after Spalding's attachment.

Those who sued out their attachments after Spalding, and previous to 24th April, filed additional affidavits, executed new bonds, and had other attachments sued out on 26th April.

Some of these attachments were at law, others in equity, but all were transferred to the equity docket and consolidated, after which those who sued out attachments, subsequent to Spalding, filed their petition to become a party, and answered, contesting the legality of his attachment because the debtor had not been absent from the State four months when his attachment issued—absence from the State for four months being the sole ground upon which all the attachments were sued out.

Mrs. Simms, setting up a claim to some of the property attached as her separate estate, was made a party. Simms, on a rule to answer her petition, appeared in all the cases, but did not contest the attachments. The causes were referred to a commissioner to report the amount of the respective claims, the order of attachments, and priority of liens. The commissioner, having reported the priority of liens according to the dates of the respective attachments, exceptions were filed to his report.

The court adjudged that the attachments could not legally be sued out until the 24th April, and that, as Spalding's had been sued out the 21st April, it should be postponed until those sued out on and after the 24th April were satisfied; which, in effect, defeats Spalding's claim, as Simms' estate is inadequate to the payment of his debts. From this judgment Spalding prosecutes this appeal.

Among the causes for attachment, provided by sec. 221 *Civil Code*, is the one found in paragraph 2, sub-section 2, or "who has been absent therefrom (the State) four months."

Whether, for the purpose of attachment, a party who leaves home with the intention of leaving the State, and who actually consummates this purpose, but who is unavoidably detained

within the State a few days, should be regarded as absent from the State, from the time he left his home, or not until he gets beyond the territorial jurisdiction of the State, is a question not free from embarrassment, and, so far as we are advised, one that has never been decided by this court.

In the case of *Speed & Beattie et al vs. Gray & Co., Mss. opin., June term, 1862*, this court held, where a defendant went, by railroad, through the States of Indiana and Illinois, to Cairo, from his home in Louisville, that he was absent from the State from the day he left home; and that the fact that the boat on which he embarked at Cairo, down the Mississippi river, had touched at Columbus and Hickman, in this State, and he not even going ashore, was not such a voluntary returning to the State as to prevent his absence from being dated from the time he left home.

The territorial limits of this State, as defined by statute, (1 *Stan. Rev. Statutes*, 221,) is on "the line run by Alexander and Munsell, on the parallel of latitude thirty-six degrees thirty minutes, to the middle of the channel of the Mississippi river, opposite the point on the Mississippi below New Madrid, fixed, marked, and ascertained by them as the point of intersection of said parallel of latitude and said river; thence up said river to the mouth of the Ohio river; thence crossing the Ohio river to the northwest bank, at low water mark; thence up the northwest bank of said river, at low water mark, to a point opposite the mouth of Big Sandy river."

The territorial jurisdiction of the State, according to this boundary, has been recognized in the case of *McFall vs. Commonwealth*, (2 *Met.*, 394.) If a defendant must actually be beyond the territorial limits of the State four months, before an attachment should issue against him, for absence, there is a manifest error in this judgment. Even if he should be deemed out of the State when he got out of the Ohio river, and before he passed below the State line on the Mississippi river, yet we cannot determine, in the absence of proof, that Simms had arrived at the mouth of the Ohio river two days after he embarked at Louisville. As his deposition was taken to establish his detention at, and departure from Louisville, by appel-

lees, the time he did arrive at the mouth of the Ohio river, and when he actually passed below the State line, on the Mississippi river, could also have been established.

Before the subsequent attaching creditors could assail Spalding's attachment, they must show that they have a valid subsisting attachment and lien; for, as between the attaching creditors and Simms, he having appeared and not contesting the attachments, the same must be regarded as valid, under section 287 *Civil Code*.

But, in reviewing the decisions of sister States, on statutes of kindred character, we observe a strong inclination to an equitable construction, so as to secure the rights of creditors, and to make the statutes remedy the evils, as designed by the Legislature enacting them.

In the case of *Moore et al vs. Holt*, (10 *Grat.*, 289,) the appellate court of Virginia said "it might be held, upon an equitable construction of the statute, that where a debtor has actually left his usual place of abode, and set off for a distant State, with the intention not to return to his residence, but in future to reside out of the State, an attachment sued out after his departure might be sustained, although it chanced he had not actually passed the State line at the time *subpoena* issued." As it was determined in this case that the debtor had actually left the State at the time of suing the attachment, it was not a necessary question to be decided; but, as the court actually so decided in the subsequent case of *Clarke vs. Ward et al*, (12 *Grat.*, 448,) this may now be regarded as authoritative in that State.

In this latter case, the attachment was sued out against Henry P. Ward, to attach his effects as a non-resident, between the hours of 10 and 11 o'clock, A. M., 28th June, 1853. Henry P. Ward had been for some time a resident of Winchester, Virginia, but had left about 9 o'clock, A. M., of 28th June, upon the Winchester and Potomac railroad, for Philadelphia, with the intention of residing there. That, on reaching Harper's Ferry, Virginia, he remained there until between 2 and 3 o'clock, P. M., of 28th June, when he took the cars for Baltimore, intending to go directly to Philadelphia. The

court held him a non-resident, within the meaning of the statute, from the time he left Winchester.

Without intending to approve in its full length and breadth, we quote a very strong case of equitable construction, decided by the appellate court of South Carolina. *Sloan vs. Bangs & Co.*, (10 Rich., 15.) This was a domestic attachment, and its validity depended on some of the defendants being within the State and attempting to remove their property at the time of suing out the attachment. Four of the five partners had been out of the State some months, but Mather, the other partner, was in Anderson, S. C., until within a few days before the issuing of the attachment. He left, professing an intention to return in a few days, leaving his baggage in the room of the hotel where he boarded. On the day the attachment bears date, he was in Athens, Georgia; but, at the time of suing out the attachment, the goods of the firm were being removed. The attachment was sustained.

The obstructions to creditors in the service of their process, for four months, and the delay in the obtention of their judgments, were the evils intended to be remedied by the Legislature. In these days of steamboat and railroad travel, the creditor may be, and generally would be, as effectually obstructed in the service of his process, from the day the debtor leaves home, as by his leaving the territorial limits of the State; and, although the debtor might be liable to delay by unavoidable and unexpected casualties, yet this would rarely, if ever, be of any practicable advantage to the creditor in getting his process served.

Where the debtor leaves his home, with the intention of going out of the State, and does consummate this purpose, and is absent from his home, pursuant to such intention, for the period of four months, we think this should be regarded as an absence from the State, within the meaning of the Code and the intention of the Legislature, notwithstanding some unlooked for casualty may have delayed him a few days from passing beyond the territorial boundary of the State.

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It follows that priority should have been given to the attaching creditors, according to the time when their respective attachments went into the sheriff's hands.

The affidavit of Spalding substantially complies with *section 222 Civil Code*, and is not liable to the objection urged against it.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded for further proceedings in conformity to this opinion.

CASE 23—PETITION EQUITY—JULY 2.

Broadwell, &c. vs. Broadwell's Adm'r.

APPEAL FROM THE HARRISON CIRCUIT COURT.

1. A testator, in 1848, devised to his wife all his estate, real, personal and mixed; in 1853 and 1854 he acquired real estate, and died in 1861. The will gave no direction about the payment of debts. The widow became administratrix, and sought to have the after acquired real estate, which descended to the heirs at law, appropriated to the payment of the testator's debts, and exonerate the personal estate and slaves, which were ample to pay them. *Held*, That the real estate could not be thus subjected, in the absence of a clear intention, either express or implied, of the testator to exonerate the personal estate and slaves. (3 *Roule, Penn. Rep.*, 236; 6 *Mass.*, 150.)

2. The laws in existence at the time the Revised Statutes went into effect govern wills previously made.

3. The bequest of a particular thing or money, specified and distinguished from all others of the same kind, is a regular specific legacy.

4. The debts of a testator are to be paid, first out of the perishable goods, not specifically bequeathed, next out of the slaves, and if these be insufficient, then out of the real estate, where the will makes no provision for their payment.

J. S. BOYD, for appellants, cited 3 *Mon.*, 285-6; 6 *Mass.*, 149; 3 *Rawle*, 229; *Livingston vs. Livingston*, 3 *Johnson's Ch'y. Rep.*; *Livingston vs. Newkirk*, *Id.*

W. W. TRIMBLE, for appellee, cited 3 *Mon.*, 285; 3 *Johnson's Ch'y. Rep.*, 320.

JUDGE WILLIAMS DELIVERED THE OPINION OF THE COURT:

Sterlin E. Broadwell made the following will in 1848:

"LEXINGTON, December 30th, 1848.

The breaking out of the cholera is hourly anticipated in our city, and, not knowing who may be the first victims to the fatal disease, I prepare this, my last will and testament, for the benefit of my dear wife, Drusilla C. Broadwell. I do give and bequeath to my dear wife, Drusilla C. Broadwell, all of my estate, in fee simple, to do as she pleases with, both real, personal and mixed.

S. E. BROADWELL."

The testator afterwards acquired real estate, in the years 1853 and 1854, and, without a republication of his will, died in 1861.

Mrs. Broadwell became administratrix, with the will annexed. She filed this petition, to have the after acquired real estate, which had descended to the heirs at law, appropriated to the payment of testator's debts, and, to the extent of its value, exonerate the personal estate and slaves of the testator from this liability.

The heirs at law contested the right of the administratrix, who was also the sole legatee, to thus exonerate the personal estate and slaves.

The circuit court, on the hearing, adjudged that the after acquired real estate, thus descended to the heirs, be sold, and the proceeds applied to the payment of the debts, and to the exoneration of the estate bequeathed. To reverse which the heirs prosecute this appeal.

The Revised Statutes provides that the laws in existence at the time they go into effect shall govern wills previously made. So these have no application to this case.

"A regular specific legacy may be defined, the bequest of a particular thing or money specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor." (1 *Roper*, 149.)

This is a general bequest and devise of all the testator's estate of every kind, and not a specific bequest.

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The laws of the land required his debts to be paid, first out of the perishable goods not specifically bequeathed, next out of the slaves, and, if these be insufficient, then out of the real estate.

As the testator made no provision for the payment of his debts, it must be presumed that he intended they should be paid in manner as provided by law.

Before the personal estate can be exonerated from this charge, even as between the legatee and heir, a clear intention, either express or implied, to exonerate it, must be manifested by the testator.

For a very elaborate discussion of this doctrine, reference is made to the cases of *Walker's Estate*, (3 *Rawle, Penn. Rep.* 236;) *Hays et al Exr's. vs. Jackson et al*, (6 *Mass.*, 150.)

Nothing herein conflicts with the case of *Trumbo vs. Lorency*, (3 *Mon.*, 285,) or *Livingston vs. Newkirk*, (3 *John. Chan. Rep.*, 820.)

As the personal estate, including the slaves, was more than ample to pay off all the testator's debts, the court erred in subjecting the real estate descended to the heirs.

Wherefore, the judgment is reversed, and the cause remanded with directions to dismiss the plaintiff's petition.

CASE 24—PETITION ORDINARY—JULY 7.

Berry & Johnson vs. Ransdall.

APPEAL FROM THE HENRY CIRCUIT COURT.

1. Any attempt by the Legislature so to change the remedy as to impair the obligation of a contract is prohibited by the Constitution.

2. A statute of limitation, which does not allow a reasonable time after its passage for the commencement of suits on existing causes of action, is unconstitutional. (4 *Wheat*, 207; 3 *Peters*, 290; 2 *Greenleaf*, 294; 8 *Mass.*, 430.) Thirty days is not a reasonable time.

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3. The act of March 15, 1862, by which, after thirty days, the limitations of actions, contained in chapter 63 of the *Revised Statutes*, should extend to and embrace all cases, whether the right of action accrued before or after the *Revised Statutes* took effect, is unconstitutional and void.

1. N. WEBB, for appellants, cited *Nichols vs. Webb*, 8th *Wheat*; 2 *Strange*, 827; 17 *John.*, 182.

SIMPSON & SCOTT, on same side.

S. E. DEHAVEN, for appellee, cited *Act of Feb. 4, 1858, Rev. Stat.*, 135; 1 *Met.*, 520; 3 *Met.*, 88.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

This action was commenced on the 26th March, 1863, upon a note payable on the 3d June, 1847. The defendant pleaded the statute of limitations, alleging that the cause of action had accrued more than fifteen years before the commencement of the action. The law and facts having been submitted to the court, the plea of limitation was sustained, and a judgment rendered in bar of the plaintiff's action, from which he appealed.

Before the adoption of the *Revised Statutes* there was no limitation to actions upon demands of this character, which, by the act of 1812, adopted in the *Revised Statutes*, are placed upon the same footing as sealed writings.

Chapter 63 of the *Revised Statutes* prescribed a limitation of fifteen years upon such actions, (*art. 3, sec. 1.*) but declared that its provisions should not apply to causes of action previously accrued. (*Art. 1, sec. 1.*)

An act approved February 4, 1858, (*Sess. Acts*, 26,) declared that the provisions of said chapter should "embrace all cases in which the cause of action accrued, whether before or after the *Revised Statutes* took effect, from and after the first day of August, 1858." But that act has been decided to be unconstitutional, so far at least as it relates to personal actions, because the subject was not expressed in the title. (*Chiles & Thomas vs. Monroe*, winter term, 1862.)

By an act approved March 15, 1862, entitled "an act to amend chapter 63 of the *Revised Statutes*, entitled 'Limitation of actions and suits,'" it was declared: "§ 1. That the provis-

ions of chapter 63 of the Revised Statutes, entitled 'Limitation of actions and suits,' shall extend to and embrace all cases, whether the right of action accrued before or after the Revised Statutes took effect. § 2. This act shall take effect thirty days from its passage."

Has the Legislature the constitutional power to prohibit the bringing of actions, after the lapse of thirty days, upon which there was before no limitation?

It is settled that the legal obligation of a contract consists in the remedy given by law to enforce its performance, or to make compensation for the failure to perform it; and, consequently, that any attempt by the Legislature so to change the remedy as to impair the obligation of a contract, is prohibited by that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts. (*Blair vs. Williams*, 4 *Littell*, 34; *Lapsley vs. Brashears & Barr*, *Id.*, 47; *Green vs. Biddle*, 8 *Wheaton*, 1, 75; *Bronson vs. Kinsie*, 1 *Howard*, 311; *McCracken vs. Hayman*, 2 *Howard*, 608; *Quackenbush vs. Danks*, 1 *Durie*, 128; 1 *Kent's Com.*, 419, note c.)

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or on the contract itself; in either case it is prohibited by the constitution." (*Smith's Com. on Con. & Stat. Construction*, 388.)

The same author says: "Although ordinary statutes of limitations to actions are not within this clause, yet if such a statute should be passed which does not allow a reasonable time, after the passing thereof, for the commencement of suits on existing causes of action, such an act would be unconstitutional." (Page 407.) This view is sustained by the opinions of several eminent jurists. (*Sturgis vs. Crowningfield*, 4 *Wheaton*, 207; *Jackson vs. Lampshire*, 3 *Peters*, 290; *Proprietors & Co. vs. Laborn et al*, 2 *Greenleaf*, 294; *Carl vs. Hagger et al*, 8 *Mass.*, 430.)

The duty of controlling the discretion of the Legislature in matters of this kind, and of deciding whether the time which it has chosen to allow for the bringing of actions, is reasonable or not, involves the performance of a delicate task. But it is a duty that cannot be avoided, and which frequently may be performed without much difficulty. For instance, an act allowing a period of fifteen years for bringing actions, upon which there was no previous limitation, would be clearly constitutional, because every one would have ample opportunity to learn that the act had *been* passed, and to bring his action; but an act allowing but one day for the bringing of such actions would be clearly unconstitutional, because, practically, it would deprive parties of the right to sue at all.

Is the period, allowed by the act under consideration, such reasonable time that it can be said not seriously to impair the obligation of the contracts affected by it?

In the case of *Pearce's heirs vs. Patton et al*, this court said: "Six months is not the time prescribed for the suit, but seven years, and if it was, we should hardly regard it as a *reasonable* time to be constitutionally available to bar the remedy as a *mere* act of limitation." (7 B. Mon., 168.) In *Lewis vs. Harbin, &c.*, this court, with manifest reluctance, sustained an act which allowed a period of five years for bringing actions upon which there was no previous limitation. And it was sustained upon the ground that "the prospective time given by the statute would seem to be reasonable, not only to enable the creditor, by the exercise of reasonable vigilance, to arrive at a knowledge of the enactment, but also to avail himself of the remedy afforded." In that case the court said: "It has been said that all must be presumed to know the law, but it is certain that the maxim is not true in fact; so far from it, there are few who do know it. Contracting parties must be presumed to know the laws under which their contracts are made, but it is not even universally true that they will be presumed to know the law of their contracts, against palpable proof to the contrary, as instances are not unfrequent of their being discharged from their contracts upon the sole ground of their ignorance of the law under which they were made. It would

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seem to be enough to require the citizen to look and know the law of his contract, and not to have imposed upon him the burthen of looking to, and availing himself of other subsequent enactments, at the peril of forfeiting forever the obligation of his contract, and the loss of his entire demand." The court also said, that if the act had "cut off all actions after the 1st day of July, 1838, only about five months after the passage of the law, a time scarcely sufficient to enable even the lawyers of the community to learn that such a law had passed, such an enactment would have shocked the moral sense of mankind as unjust and iniquitous." (5 B. Mon., 564.)

To require that persons, upon whose causes of action there was no limitation, should learn that the statute under consideration had been enacted, and bring their actions within thirty days after its enactment, would be unreasonable and oppressive. In our opinion, the said statute is unconstitutional and void.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

 CASE 25—PETITION ORDINARY—JULY 8.

Whitney vs. Sudduth, &c.

APPEAL FROM THE BOURBON CIRCUIT COURT.

A note given, "we or either of us, directors of Centreville and Jacksonville Turnpike Co., promise to pay," &c., is the individual obligation of those who signed. It is not the obligation of the corporation.

JNO. A. PRALL, for appellant, cited 2 *Kent's Com.*, B1; *Story on Agency*, 147; 1 *B. Mon.*, 201; 3 *Exch.*, 3; *Chitty on Contracts*, 210; 3 *Marsh.*, 258; 7 *Mon.*, 356; 2 *Bibb*, 397; 3 *Mrsh.*, 184; 1 *Greenleaf's Ev.*, sec. 282; 1 *Mason's Rep.*, 11; 3 *Met.*, 397.

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R. T. DAVIS, for appellees, cited 1 *Met.*, 71; 1 *Marsh.*, 485; 10 *B. Mon.*, 351; 16 *Pick.*, 347; *Story on Agency*, secs. 154, 276; *Angell & Ames on Corporations*, pages 284-5; 10 *Gill & Johnson*, 280.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

The appellant sued the appellee on the following note:

"On or before the 7th of September, 1861, we or either of us, Joseph Cantrill, Pres't, Dr. Jos. Cantrill, L. G. Sudduth, Jas. T. Ware, and J. W. Allison, Directors of Centreville and Jacksonville Turnpike Co., promise to pay to George H. Whitney, or order, fifteen hundred and nine $\frac{16}{100}$ dollars, for value received, this 7th day of March, 1861.

(Signed:)

JOS. CANTRELL, *Prest.*,
LEVI G. SUDDUTH,
J. T. WARE,
JNO. W. ALLISON,
JOS. CANTRILL, JR."

The judgment of the court below was, in effect, that the plaintiff was entitled to a judgment against the corporation, but not against the defendants individually, and the action was therefore dismissed. From that judgment the plaintiff has appealed.

The sole question to be decided is, whether the defendants are individually liable on the note, or whether it is the obligation of the corporation mentioned in it.

This, of course, is a question of intention to be determined from what appears on the face of the writing. It is true, as contended, that the later cases on this subject have, to some extent, modified the rule adopted in the earlier cases, the application of which rule, instead of giving effect to the obvious intent of the parties, often defeated it. But none of the cases have gone to the extent of varying the legal import of the contract, according to the natural meaning of the terms employed by the parties.

The case of *Nash vs. Roberts*, (1 *B. Mon.*, 201,) is analogous to the present case in every material particular. There the defendants, "as trustees of the town of Harrodsburg," jointly

and severally promised to pay to the order of Phelps, superintendent, &c., one hundred dollars in nine months, &c. The note was signed by Sutton, as President, and by Jones and three others styling themselves trustees. It was held "that the instrument does not purport to be a corporate act, either in the body or in the form of its execution, and is entirely without a seal. It does not profess to bind the town, or the trustees of Harrodsburg generally, nor does it make any reference to the successors of those who executed it. There is, moreover, nothing in it pointing to the funds of the town as the source, much less as the only source to which the obligee is to look for payment. But the defendant, designating themselves as trustees, both in the body of the note and in their signatures to it, as trustees, promise to pay, not only jointly, but severally also.

The note binds no other person or thing, and perhaps could not have bound any other but themselves, for the payment of the one hundred dollars, which they expressly, and jointly and severally promise to pay; and the question is, whether they are, or intended to be, individually bound? The language of the note is not "the trustees of Harrodsburg promise to pay," &c., but "we, as trustees, promise." It is not the trustees merely who promise, but the defendants, as trustees, promise; and if it were otherwise uncertain whether they promised or intended to promise individually, all doubt is removed by the fact that they promise severally. This several liability must be personal. It is wholly inconsistent with a restricted liability, merely in the artificial character of trustees."

This reasoning is so conclusive, and so manifestly applicable to the present case, that nothing need be added to sustain the conclusion to which it leads—a conclusion we believe to be right, and from which therefore we cannot depart. The subsequent cases referred to will be found, on examination, to be clearly distinguishable from the present, either in the import of the obligation itself or in the facts connected with its execution.

Our conclusion is, that the note in question, according to its import, and the intent of the parties as evidenced by its terms, imposes a personal liability on the defendants, binding

them individually, and not the corporation of which they style themselves the members.

The judgment is therefore reversed, and the cause remanded for judgment and further proceedings in conformity with this opinion.

CASE 26—PETITION EQUITY—SEPTEMBER 23.

Short & Co. vs. Trabue & Co.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

1. By the law of this State, a remote assignor of a note is not primarily liable to the holder; and the immediate assignor is only liable for the consideration received, with six per cent interest, and the holder cannot make him liable without first prosecuting the payor with diligence. Otherwise by the law of Louisiana.

2. An agreement to perform an act at a particular place is presumed to be made with reference to the law of that place; and an agreement to perform an act, without designating a place of performance, is presumed to be made with reference to the law of the place at which the agreement is made. These presumptions are conclusive. The same rule applies to both parties to the contract.

3. The indorser of a note promises, upon certain conditions, which are not expressed in the contract of indorsement, but which are implied by law, that he will pay it; but not that he will pay it at the place named in the note for payment. His promise is general for the payment of the note, on the implied conditions; and such general promise, not specially to be performed elsewhere, is governed by the *lex loci contractus*, which must determine the conditions upon which he is to be held liable.

4. In an action against the indorser of a note, payable in one State and indorsed in another, the laws of which differ, the liability of the indorser depends upon the law of the place of indorsement, and not upon that of the State where it is payable, nor upon the *lex domicilii*.

5. The indorsement, by a citizen of Louisiana, made in Kentucky, on a note payable to him in Louisiana, is governed by the law of Kentucky.

CHAS. RIPLEY, for appellants, cited *Edwards on Bills*, 263; 4 *Dev.*, (N. C.) 123; 7 *Ala.*, 120; 2 *Kelly*, (Geo.) 158; 2 *Ala.*, 395;

5 *Ib.*, 286; 7 *B. Mon.*, 578; *Story Conflict of Laws*, 316, *b*; 1 *Met.*, (*Mass.*) 82; 12 *Wendell*, 439.

G. A. & I. CALDWELL, for appellees, cited 2 *Kent*, 459; 1 *Adol. & Ellis, New Series Eng. Rep.*, 43; 6 *Mass.*, 159; 14 *Vermont*, 33; 7 *B. Mon.*, 575.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Clanton & McFadden executed a note in Kentucky, where they resided, to Short & Co., residents of Louisiana, payable at their office in New Orleans, with interest at the rate of eight per cent. per annum. The note was indorsed and assigned by Short & Co., to Cayce & Hopkins, and by them to Trabue & Co. Both assignments were made in Kentucky, where Cayce & Hopkins and Trabue & Co. resided. The stipulated interest is lawful in Louisiana, and not here. The note not having been paid at maturity, Trabue & Co. had it protested, gave notice of its dishonor, brought this action against Short & Co., and obtained a judgment against them for the amount of the note and eight per cent. interest, from which they appeal.

By the law of this State, a remote assignor of a note is not primarily liable to the holder; and the immediate assignor is only liable for the consideration received, with six per cent. interest; and the holder cannot make him liable without first prosecuting the payor with diligence. The judgment must, therefore, be reversed, if the liability of Short & Co. is governed by the law of this State.

The allegations of Trabue & Co., that, "by the law of Louisiana, where the said writing is payable, it is placed on the footing, and has the force and effect, of a bill of exchange," is denied by the answer and not sustained by the proof, and, therefore, we need not consider the effect of an indorsement, here, of a paper having the form of a note, according to our law, and the effect of a bill, according to the law of another country in which it is payable.

It is proved, however, that, by the law of Louisiana, each prior indorser of a note like this is primarily liable to the holder, for the amount of the note and the stipulated interest,

not exceeding eight per cent., upon a protest and notice of non-payment, without a previous suit against the payor; and the counsel of Trabue & Co. contend that Short & Co. are liable according to that law.

The question, what law governs a contract, depends, theoretically at least, upon the intention of the contracting parties. But, to ascertain their intention, the courts have established certain rules, which experience teaches that it is better to observe, though they may sometimes defeat the intention of parties, than to attempt to ascertain their intention by considering their verbal declarations, or the minute circumstances of each particular case.

According to those rules, an agreement to perform an act at a particular place, is presumed to be made with reference to the law of that place; and an agreement to perform an act, without designating a place of performance, is presumed to be made with reference to the law of the place at which the agreement is made. And these presumptions are conclusive. Regarding the obligation of the contract, as a general rule, a person agreeing here to perform an act in another country is precluded from showing, by any evidence whatever, that he contracted with reference to the law of this State; and a person agreeing here to perform an act, without designating a place of performance, is precluded from showing, by any evidence whatever, that he contracted with reference to the law of any other country. The same rule applies to both parties to the contract.

The counsel of Trabue & Co. concede, that, as a general rule, an indorsement of a note or bill, such as was made by Short & Co., makes the indorser liable according to the law of the place of indorsement. But they rely upon the facts, that Short & Co. resided in New Orleans, that the note was payable there, and that it bears Louisiana interest, for the purpose of showing that Short & Co., when they indorsed it, contemplated taking it up in New Orleans, if the makers should fail to pay it; and, consequently, that they, as indorsers, contracted with reference to the law of Louisiana, and are bound thereby.

One of the cases cited in support of that position is the case of *Grimshaw vs. Bendor*, (6 Mass., 157,) which was a suit upon a bill drawn at Manchester, on a Boston firm, and accepted on the same day, to be paid in London. The court said: "It appears that the bill was drawn on a *Boston* house, one of which was then at *Manchester*, in *England*, but that his domicile was in *Boston*; and that the acceptance by him, in the name of the firm, was made at *Manchester*, by which the firm undertook to pay the bill in London in six months. From this statement it is manifest that the remedy contemplated by the parties, in the event of the bill being dishonored, must be sought in this State, where the acceptors lived. From this view of the case, the instrument must be considered as a foreign bill, having the same effect as if the payee had sent it to *Boston*, and it had been accepted payable in London by the house here, in which case the money must be remitted to London to meet the bill remitted to the payee after acceptance."

This reasoning is not satisfactory. The fact that the parties contemplated that, upon the dishonor of the bill, the remedy would be sought against the acceptors at the place of their residence, does not prove that they regarded the law of that place as governing the nature and obligation of the contract. A resident of Massachusetts, temporarily here, and making here a note payable generally, and another note payable in New York, may safely be assumed to contemplate that, upon his default, the holder of each note will seek his remedy in Massachusetts. Yet, it is well settled, that the nature and obligation of the former note would depend upon the law of this State, in which it was executed, and those of the other upon the law of New York, where it was payable.

The fact that Short & Co. resided at the place where this note was payable, may furnish reason to believe that they expected to pay it there if the payors should fail to pay it. But when a resident of another State executes a note here, payable at no particular place, is there not equal reason to believe that he expected to pay it at the place of his residence? And is there not as much reason for applying the law of the dom-

icil to the nature and obligation of the contract in the latter case as in the former?

According to the case of *Grimshaw vs. Bendor*, Clanton and McFadden are liable according to the law of Kentucky, because they resided here, though they promised to pay the note in Louisiana; whilst Short & Co. are liable according to the law of Louisiana, because they resided there, though they indorsed the note here. We are not aware of any other case in which the nature or obligation of a contract has been held to depend upon the *lex domicilii*. In all other cases known to us those qualities of a contract are held to depend upon the law, of the place where it is made, or where it is to be performed.

The authority of that case is, in our opinion, justly questioned by Judge Story, who, after stating that it is directly in conflict with *Foden vs. Tharp*, (4 John. R., 183,) says, that the latter case "being in entire harmony with the general principles on this subject, will probably obtain general credit in the commercial world." (*Con. of Laws*, sec. 320.)

The counsel of Trabue & Co. also cite the case of *Rothchild vs. Currie*, (1 Ad. & El. N. S., 43,) which was a suit by an indorser against the payee and indorser of a bill, drawn in England on, and accepted by, a French house, both the plaintiff and defendant being domiciled in England; and it was held, that notice of the dishonor of the bill, given by the plaintiff to the defendant, according to the law of France, was sufficient. The court said: "This bill being payable in France, is a foreign bill, and, although drawn in England, must be taken, as between the drawer and drawee, to have been made in France. * * And if this be so as between the drawer and drawee, it is equally true as between the indorser and indorsee, the former of whom must be considered as the drawer of a new bill, payable at the same place, in favor of the indorsee. * * Being in law a new drawer of the bill, the same state of things is supposed to exist, as between him and the indorsee, as the law supposes between the drawer and drawee."

We have not discovered a good reason for excepting contracts of indorsement from the general rule, that a contract to

be performed at no particular place is governed by the law of the place where it is made. Nor do we perceive any reason whatever for holding, as was done in *Rothchild vs. Currie*, that a person, who, by an indorsement, agrees, upon certain implied conditions, to take up a bill, generally occupies the same attitude toward his indorser, which a person, who, by an acceptance, agrees to pay a bill at a particular place, occupies toward the drawer or payee.

According to the doctrine of that case, it would seem that the law of the place where a note or bill is payable, should fix the rights and liabilities of every indorser as to damages or interest, as well as notice of dishonor. And it was accordingly held, in another case cited by the counsel of Trabue & Co., that, upon a note made in Canada and indorsed in Vermont, in both of which places the rate of interest was six per cent., and payable in New York, where the rate of interest was seven per cent., the indorser, as well as the maker, was liable for seven per cent. interest. (*Perks vs. Mayo*, 14 Vermont, 33.) But the better opinion probably is, that each indorser is liable for interest or damages according to the law of the place of his endorsement. (2 *Parsons on Notes and Bills*, 372; *Story on Bills*, sec. 153; *Story on Con. of Laws*, sec. 314, and cases cited.)

The decision in *Rothchild vs. Currie* is sanctioned by Mr. Parsons, (2 *Notes and Bills*, 339, note j.) and was approved and followed by the Supreme Court of Indiana in *Shanklin vs. Cooper*, (8 Blackf., 41.) Possibly there may be reasons for holding that notice of dishonor should be given to indorsers, according to the law of the place of payment, which do not apply with reference to the liability of indorsers in other respects. But, even with reference to giving notice of dishonor, the decision in *Rothchild vs. Currie* seems to be opposed by preponderating authority. (*Story on Bills*, sec. 296, note 4; *Aymer vs. Sheldon*, 12 Wend., 439; *Allen vs. Merchants' Bank*, 22 Wend., 215; *Dundas vs. Bamler*, 3 McLean, 397.) So far as the doctrine of that case applies to the question involved in this case, it is not sustained by any direct decision, that we are aware of, except that in the above named case of *Shanklin vs. Cooper*, whilst it is directly in conflict with the decisions in the follow-

ing cases: *Holbrook vs. Vibbard*, 2 *Scammon*, 465; *Hatcher vs. McMorine*, 4 *Dev.*, 122; *Lowry's adm'r. vs. Western Bank of Georgia*, 7 *Ala.*, 120; *Cox vs. Adams*, 2 *Kelly's Ga. R.*, 158; *Mix et al vs. the State Bank*, 13 *Ind. R.*, 521; *Hunt vs. Standart*, 15 *Ind. R.*, 33, expressly overruling *Shanklin vs. Cooper*. In each of those cases, except *Cox vs. Adams*, the action was against the indorser of a note payable in one State and indorsed in another, the laws of which differed, notice to the indorser being required by the law of one and not by that of the other; and it was held that his liability depended upon the law of the place of indorsement. The only difference between those cases and that of *Cox vs. Adams* is, that in the latter the note was not payable at any particular place. But that distinction was not material, perhaps, because the note was presumptively payable in Georgia, where it was executed, and the maker's liability was governed by the law of that State, as the court conceded, just as it would have been had the note been expressly payable there; yet the indorser's liability was held to depend upon the law of Alabama, where the indorsement was made.

We do not perceive how this controversy between assignors and assignees can be affected by the fact that the makers of the note agreed to pay eight per cent. interest. That fact does not seem to be material, even for the purpose of showing that the makers of the note contemplated Louisiana as the place of performance of their contract, because the latter fact is conclusively proved by their stipulation to pay the note in New Orleans. Each of those stipulations bound them only, and not the assignors. We do not perceive how the former stipulation, any more than the latter, can prove that the assignors contemplated Louisiana as the place of performance of their contract.

Another question is presented. It was proved that when the note was executed, one of the makers, Clanton, agreed to ship produce to Short & Co., they agreeing to sell it and pay the note with the proceeds. And this is relied upon as showing that Short & Co., when they indorsed the note a few days afterward, contemplated taking it up in New Orleans. But we do not consider the fact, that Short & Co. expected to sell

produce and pay the note with the proceeds, as the agents of Clanton, as sufficient to prove that they contemplated taking up the note in New Orleans, as indorsers, upon the failure of Clanton to ship the produce, and upon the failure of Clanton & McFadden to pay the note. It may be assumed that the payee of a note for value always expects the makers to pay it. Whether he expects them to do so by forwarding produce or money, and whether he expects them to forward the produce or money to himself or to some one else, would seem to be immaterial. It is, therefore, unnecessary to decide whether or not the pleadings laid a foundation for the evidence on this subject.

In our opinion, neither of the facts relied on by the appellees can relieve this case from the operation of the general rule upon this subject, which was thus stated in the case of *Hunt vs. Standart*, cited above: "The maker binds himself to pay at the place named in the note for payment, and there his contract is to be performed. The indorser promises, upon certain conditions, which are not expressed in the contract of indorsement, but which are implied by law, that he will pay the note; but not that he will pay it at the place named in the note for payment. His promise is general, for the payment of the note on the implied conditions; and such general promise, not specially to be performed elsewhere, is governed by the *lex loci contractus*, which must determine the condition upon which he is to be held liable."

We do not regard this position as in conflict with the reasoning of the court in *Goddin vs. Shipley*, (7 B. Mon., 575,) to which we are also referred. On the contrary, the court there expressed a doubt whether an indorsement and assignment, here, of an instrument having the form of a note according to our law, but which was placed on the footing of a bill by the law of Missouri, where it was payable, made the indorser liable, according to our law, as the assignor of a note, or as the indorser of a bill; and reasons were suggested for supposing that he might be liable as the assignor of a note, though that position seems to conflict with another part of the opinion, in which it was said, according to the laws of Missouri, "the note

is, in effect, an inland bill of exchange, and the rights and liabilities of the parties are to be governed by the law relating to those instruments. It is to be treated as an inland bill, not only in Missouri, but wherever its character and effect come in question." It is true that the court, in stating the supposed case, spoke of an assignment made here, "and by a citizen of Kentucky." But we do not suppose that the court meant to intimate that a contract of assignment is governed by the *lex domicilii*, since that position would conflict with a previous part of the opinion, which recognizes the correctness of the doctrine that contracts, to be performed at a particular place, are to be governed by the laws thereof. At any rate, such a *dictum* cannot be regarded as entitled to much weight.

The judgment is reversed, and the cause remanded with directions to discharge the attachment and dismiss the petition without prejudice.

CASE 27—FORCIBLE ENTRY AND DETAINER—SEPTEMBER 25.

Belcher vs. Barrett, &c.

APPEAL FROM THE LAWRENCE CIRCUIT COURT.

1. The provisions of the Civil Code regulating proceedings in cases of forcible entry and detainer, (sections 500 to 518, inclusive,) are a substantial re-enactment of the act of 1810. (*Stat. Law*, 715.)
2. The want of a judgment upon the verdict of a jury in the country, on a writ of forcible entry and detainer, is no ground for dismissing the traverse in the circuit court. Such judgment is not necessary to enable a party to maintain a traverse.
3. In such case the truth of the inquisition in the country is the only matter involved in the issue to be tried by the jury in the circuit court.
4. Upon an inquest in the country on a writ of forcible entry and detainer, the verdict of the jury, "the defendants not guilty," is sufficiently explicit and responsive to the inquiry submitted to them, and a traverse thereof may be brought. Strict technical precision and regularity not required in verdicts and proceedings under the statutes regulating this remedy.

Belcher vs. Barrett, &c.

A. J. JAMES, for appellant, cited *Civil Code*, sec. 511; 4 *Dana*, 597.

JAS. M. RICE, on same side, cited *Civil Code*, secs. 509, 511; 4 *Dana*, 596.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the court below dismissing the traverse of an inquest found by a jury in the country on a writ of forcible entry and detainer sued out by the appellants against the appellees.

It appears from the record, that the motion to dismiss the traverse was based upon the grounds: *First*, that there had been no regular inquest in the country; and *secondly*, that no judgment in conformity with the inquest had been rendered by the justice who presided on the trial in the country.

We think that the court below erred in sustaining the motion upon either of these grounds.

1. It distinctly appears in the record, that the jury found "the defendants not guilty." This was sufficiently explicit and responsive to the inquiry submitted to them. Verdicts and proceedings under the statutes regulating this remedy have never been held to the test of strict technical precision and regularity.

2. No judgment, according to the inquisition, appears to have been rendered by the justice as required by the *Civil Code*, sec. 508; nor was such judgment necessary to enable the appellant to maintain his traverse. For, by section 511, "if either party conceive himself aggrieved by the *finding of the jury*, he may file a traverse *thereof* with the justice," &c. And moreover, the form of the traverse, as prescribed in the same section, is that "the plaintiff [or the defendant] saith that the inquisition retained in this cause is not true; wherefore," &c. On this traverse, the traversee is required to join issue in the circuit court, which issue is to be tried by a jury, and judgment given on the verdict as in other cases. It is obvious, therefore, that the truth of the inquisition in the country is the only matter involved in the issue to be tried by the jury in the circuit court.

The provisions of the Code of Practice regulating proceedings in cases of forcible entry and detainer (secs. 500 to 518

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inclusive) are a substantial re enactment of the act of 1810, (1 *Stat. Law*, 725.) And under this statute it was held that the want of a judgment upon the verdict was no ground for dismissing the traverse in the circuit court.

Wherefore, the judgment is reversed, and the cause remanded with directions to overrule the motion to dismiss the traverse, and for further proceedings not inconsistent with this opinion.

CASE 28—PETITION EQUITY—SEPTEMBER 28.

Stern vs. Freeman.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

1. A party, in order to obtain here, the benefit of the law of another State, should aver, as well as prove, that that was the place of the contract.

2. A statement in an answer that, at the time of the execution of the note sued on, the defendant was an infant under the age of 21 years, is sufficient. It is not necessary to aver that the note was voidable.

3. Where the plea of infancy is relied on in the defendant's answer to a suit upon a note, the plaintiff has a right to prove a ratification of the contract, without averring it in his pleadings. See opinion for a discussion of the question and reference to authorities.

4. *Quere.* Does the principle *supra* apply to an acknowledgment or promise relied on to save a claim barred by limitation?

5. The statute which provides that no action shall be brought to charge any person upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy, unless the promise or ratification, or some memorandum or note thereof, be in writing, &c., (*Rev. Stat.*, chap. 22, sec. 1,) applies to all cases in which the plaintiff relies upon a promise or ratification, such as the statute refers to, in support of his action, whether he declares upon it, or proves it to avoid the plea of infancy.

6. The statute *supra* applies to every express promise to pay a debt contracted during infancy; but not to an express promise to perform any other contract made during infancy, unless such promise is embraced by the word "ratification."

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7. *Quere.* To what is the word "ratification," in the statute *supra*, designed to apply?

8. A writing, showing that the defendant has performed an act of ratification, is as effective as one containing an express ratification.

9. Where a writing, addressed to another than the plaintiff, is relied upon, not as constituting a ratification, or containing a promise; but, as evidence of a ratification previously made by the defendant, it is entitled to the same weight as if it had been addressed to the plaintiff.

10. Parol evidence, concerning a writing and its contents, admitted without objection, is entitled to the same weight as the writing itself, had it been produced.

11. An infant purchased the interest of his partner in a mercantile concern, and gave his notes therefor. After coming of age, he retained possession of the property and dealt with it as his own; in his own name and for his own benefit conducting the business, selling the goods and collecting the debts which had belonged to the late firm. The facts inferred from a letter written by him to a creditor of the firm, as well as from the statements of his answer. *Held*, That these acts were a ratification of the purchase, and he must pay the notes given for the purchase money. (1 *Greenleaf*, 11; 8 *Id.*, 406; 2 *Kent's Com.*, 253.)

BUSH & TEVIS, for appellant, cited 8 *B. Mon.*, 135; 1 *Parsons on Contracts*, 270, note b; 11 *John.*, 539; *Parsons on Contracts*, 271, note c. e; 2 *Dev. & Batt.*, 320.

FRY, for appellee, cited 4 *J. J. Mar.*, 238.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Freeman brought this action, and attached property belonging to Stern, a non-resident, to satisfy a note executed by him to the plaintiff. Stern answered, that "at the time of the execution of said note, this defendant was an infant under the age of 21 years;" and this is the only defense that we need to notice.

Defendant's answer and the evidence show that the plaintiff and defendant were merchant partners until October 22, 1859, when the plaintiff sold his interest in the concern to the defendant, then under 21 years of age, in consideration of the note sued on, and other notes then executed. Defendant attained the age of 21 years in December, 1859. It is proved, by parol evidence, that, up to the time this action was brought, in June, 1860, defendant, in his own behalf, carried on the business, selling the goods and collecting the debts, that formerly belonged to him and the plaintiff; and it is proved, that, in March, 1860, about three months after he attained the age of 21 years, he wrote a letter to Liebor, who owed money for

goods purchased from Freeman & Stern, stating that he "had the collecting the debts due the firm of Freeman & Stern, and that he was going on in the same business in his own name."

The chancellor rendered a judgment for the plaintiff, to reverse which the defendant appeals.

The first question is, whether the rights of the parties depend upon the laws of Kentucky or the laws of Pennsylvania.

There being no proof to the contrary, we should probably have had no difficulty in presuming that the common law prevails in Pennsylvania, if it had appeared that the contract was made and ratified there. But it does not so appear, because, though there is evidence conducing to prove that the defendant resides in Pennsylvania, that the note was executed there, and that the ratifying acts before mentioned were performed there, we cannot consider that evidence, since neither of those facts is averred by either of the parties. Either of them, in order to obtain here, the benefit of the law of Pennsylvania, should have averred, as well as proved, that that was the place of the contract. As it has not been shown that any other law applies to the case, we must, in deciding it, necessarily be governed by the laws of this State.

The note, having been executed when the defendant was under 21 years of age, was voidable; and the simple statement of the fact in his answer is sufficient. He was not bound to aver that the note was voidable, nor otherwise to state the law of the case.

But the plaintiff contends that the note was made unavoidable by the ratification of the defendant. And here the question arises, whether or not the plaintiff was bound to aver the ratification in his petition, or by an amended petition.

The Code of Practice declares, that "there shall be no reply except upon the allegation of a counter-claim or set-off in the answer;" (*sec.* 132,) and that, "the allegation of new matter in the answer, not relating to a counter-claim or set-off, * * is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require." (*Sec.* 153.) The question is, whether or not, under the old practice, the plaintiff could reply a ratification of the contract, in avoid-

ance of the plea of infancy. If he could, he may, under the Code, prove the ratification without a reply, and without setting it forth in an amended petition.

Upon this question there appears to have been some conflict of opinion, as is shown by the cases referred to in *Moor vs. Williams*, 11 *Mer. & Welsby*. Mr. Chitty, however, without referring to any conflict of opinion upon the subject, says, that to a plea of infancy in assumpsit, the plaintiff "may reply to the whole, or part, that the defendant ratified and confirmed the promise after he came of age." (1 *Ch. Pl.*, 612.) And again, in speaking of replications which confess and avoid the plea, he says, that, "if infancy be pleaded, the plaintiff may reply that the goods were necessities, or that the defendant, after he came of age, ratified and confirmed the promise." (*Id.*, 657.) The doctrine stated by Mr. Chitty seems to be founded upon principle. The manner of pleading depends upon the question whether the right of recovery, in such cases, is based upon the original contract, or upon the ratification. If upon the latter, it would have been necessary, under the old practice, in all actions, excepting, perhaps, *general assumpsit*, to declare upon the ratification, or to set it forth by a new assignment, in the form of a replication to the plea of infancy, which would have been, in effect, declaring anew upon the ratification. But if the right of recovery is based upon the original contract, the ratification, under the old practice, would have formed matter for a replication in confession and avoidance of the plea.

That the right of recovery, in many if not all such cases, is based upon the original contract, and not upon the ratification, seems to be conclusively proved by the fact, that, by the common law, the plaintiff may recover upon a contract made by the defendant during infancy, which he has ratified by merely failing to disaffirm it within a reasonable time after coming of age, (*Kline vs. Beebe*, 6 *Conn.*, 494; 2 *Kent's Com.*, 238,) since it is clear that a person cannot be held liable for failing to disaffirm a contract which he is not bound to disaffirm; and, also, by the fact that, by the common law, a sale of land by an infant may be ratified verbally, notwithstanding

a statute prohibiting the sale of land except by writing. (*Houser vs. Reynolds*, 1 *Hayea*, 143; *Wheaton vs. East*, 5 *Yerger's Tenn. R.*, 41.) It seems clear, that in both those classes of cases the right of recovery is based, and can be based only, upon the original contract, the ratification having no effect whatever, except to prevent the defendant from avoiding his contract.

Probably where a person, after coming of age, has promised to pay a debt contracted during infancy, or has done an act from which the law implies such a promise, the plaintiff might declare upon the new promise, relying upon the original consideration to support it. But he is not obliged to do so. He may declare upon the original contract, and show the new promise, like any other ratification, in avoidance of the plea of infancy. This results necessarily from the fact that the contract is voidable only, and not void. It is valid until disaffirmed. No ratification is needed to make it binding. Disaffirmance is needed to invalidate it. The plaintiff may, therefore, sue upon it, and if the defendant pleads infancy, the plaintiff may avoid the plea by showing a promise, or other act of ratification, by which the defendant has deprived himself of the right to avoid the contract. In such a case, the only effect of the ratification is to prevent the defendant from disaffirming the contract sued upon, which, being valid until disaffirmed, clearly forms the basis of recovery, the ratification forming matter of confession and avoidance to the plea of infancy.

It may be proper to add, that, under the Code of Practice, this question probably stands upon a different footing from that relating to an acknowledgment or promise, relied upon to save a claim barred by limitation.

It follows, from what we have said, that the plaintiff in this case had a right to prove a ratification of the contract, without averring it in his pleadings. Has he done so?

We have a statute declaring that "no action shall be brought to charge any person * * upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy, * * unless the promise * * or ratification, or some memorandum or note thereof be in

writing, and signed at the close thereof by the party to be charged therewith, or by his authorized agent. (*Rev. Statutes, chap. 22, sec. 1.*)

The statute applies, literally, only to those cases in which the plaintiff declares upon the new promise or ratification. But, construed literally, it would probably be wholly unavailing, because the plaintiff might, in every case, declare upon the original contract, and prove the ratification in avoidance of the plea of infancy. We have no doubt that the statute was designed to apply, and we regard it as applying, to all cases in which the plaintiff relies upon a promise or ratification, such as the statute refers to, in support of his action, whether he declares upon it or proves it to avoid the plea of infancy.

But to what kinds of promise and ratification does the statute apply? It clearly applies to every express promise to pay a debt contracted during infancy. But it does not apply to an express promise to perform any other contract made during infancy, unless such promise is embraced by the word "ratification."

Was that word designed to apply only to verbal ratifications and evidences of ratification, such as a promise to perform a contract (not for the payment of a debt,) made during infancy, or an acknowledgment by the defendant that, after coming of age, he had performed some act of ratification?

Or does it apply also to such acts of ratification as a refusal by the defendant, after coming of age, to rescind a contract made during infancy, when applied to for that purpose by the other party; or a sale by the defendant, after coming of age, of property purchased during infancy? Was it intended that a person may ratify the purchase of a horse, made during infancy, by delivering a bill of sale of it, after coming of age—which would be written evidence of an act of ratification; but that he cannot ratify the purchase by a verbal sale and delivery of the horse?

And does it also apply to cases in which the plaintiff relies upon a negative ratification, such as the defendant's failure to disaffirm the contract within a reasonable time after coming of age? Was it intended that an infant, buying land and re-

taining possession of it during ten years, without disaffirming the contract, may then avoid it by pleading infancy, unless he shall have ratified it in writing?

We do not consider it necessary, however, to answer either of those questions, because, if the statute applies to such acts of ratification as were performed by the defendant, yet the evidence, in our opinion, shows that the plaintiff is entitled to recover.

The defendant's letter to Leibor was not produced. But Leibor's testimony, concerning it and its contents, having been admitted without objection, is entitled to the same weight as the letter itself, had it been produced.

The letter did not speak, in so many words, of the defendant's purchase of the plaintiff's interest in the partnership effects. But that the defendant had made such a purchase is clearly inferable from the statements that he had the collecting of the debts "due to the late firm," and that he was "going on in the same business in his own name."

The defendant's answer states that the note sued upon was given, with others, to obtain the plaintiff's withdrawal from his partnership with the defendant. The answer and the letter to Leibor, connected, leave no room for doubt, that the purchase referred to, though not expressly mentioned in the letter, was the same for which the note sued on was given.

The statements of said letter also authorize the inference that the defendant, after coming of age, retained possession of the property thus purchased from the plaintiff, and dealt with it as his own, in his own name and for his own benefit, conducting the business, selling the goods and collecting the debts, which, but for his contract with the plaintiff, would have belonged to them as partners.

Those acts were a ratification of the purchase, and the defendant must pay the notes given for the purchase money. (*Hubbard vs. Cummings*, 1 *Greenf.*, 11; *Lawson vs. Lovejoy*, 8 *Greenf.*, 405; 2 *Kent's Com.*, 253.)

The statute does not require the plaintiff to produce a written ratification. It only requires that the "ratification, or some memorandum or note thereof," shall be in writing. A writing,

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showing that the defendant has performed an act of ratification, is as effective as one containing an express ratification.

As the letter to Leibor sufficiently identifies the contract relied upon by the plaintiff, as having been ratified, the fact that it was addressed to Liebor, and not to the plaintiff, is immaterial. It is relied upon, not as constituting a ratification or containing a promise, but as evidence of a ratification previously made, and as such it is entitled to the same weight as if it had been addressed to the plaintiff. (*1 Smith's Lead. Cases, side page 137, and cases cited.*)

The judgment is affirmed.

CASE 29—PETITION EQUITY—SEPTEMBER 28.

Brown vs. Story's Adm'r., &c.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

1. Debts, owing to mechanics for the construction or repairing of houses in the city of Louisville, are favored by the law, and a preference is given to them over other debts of the owners of the property, to the extent of the value of the property improved which has not been previously incumbered.

2. The lien of a mechanic upon a house constructed by him in the city of Louisville, for the amount due him therefor, is an incumbrance upon it within the meaning of *chap. 36, art. 15, of the Rev. Statutes.*

3. Where such lien exists, and an execution is levied upon the property, the purchaser, at the sale made under it, and his vendee, only acquire a lien thereon for the purchase money and interest after the rate of ten *per centum per annum* from the day of sale till paid. That the property was not levied upon and sold as incumbered property, and that, after the sale, the purchaser removes the incumbrance which was upon it, will not give him an absolute title.

4. Other creditors may, before the purchaser has by suit removed the incumbrance, bring suit to subject the incumbered property. (*Rev. Stat., sec. 2, art. 15, chap. 36.*) But, where the purchaser under the execution has otherwise removed the prior incumbrance, and sold the property before the suit was brought, the sale may be permitted to stand, and a personal judgment be rendered against him.

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RILEY & RUSSELL, for appellant.

JAS. HARRISON, for appellees, cited 3 *Met.*, 195; *Rev. Statutes*, chap. 36, art. 15, sub-section 2 of section 1.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

In 1856 Howard leased an unimproved lot in the city of Louisville, for ten years, from Dr. Johnson and others, and bound himself to erect a brick building on it, and Johnson, &c., were to pay him the value of the building at the end of the term. Norwood, a mechanic, under a contract with Howard, constructed a building on said lot, and, on the 3rd of May, 1858, had a lien on said house for the construction thereof. Johnson, &c. also claimed to have a lien on the property, for a considerable amount due them for rent. On the last named day Duvall & Co. and J. Watson, being judgment creditors of Howard, caused executions to issue on their judgments and had them levied on the leasehold estate, which was sold, and Buford became the purchaser, who afterwards sold his interest, acquired by his said purchase, to appellant. Appellees, creditors of Howard, brought this suit against Brown and others to subject the property to the payment of their debts.

The only material question raised by this record is, had Howard created a *bona fide* incumbrance on the property, before the executions, under which Buford purchased, had been levied upon it, so as to bring his purchase within the operation of chap. 36, art. 15, page 488, 1 vol. *Rev. Statutes*? By an act, approved 22d Oct., 1831, it is declared that carpenters, joiners, brick and stone-masons, plasterers, tinnerns, painters, brick-makers, lumber merchants, and all other persons performing labor, or furnishing materials, for the construction or repair of any building within the city of Louisville, shall and may have a joint lien upon the buildings they may be employed to construct or repair, or for which they may furnish materials, to the extent of labor done or materials furnished, &c. (3 vol. *old Dig. Stat. Law*, 409.)

Debts, owing to mechanics for the construction or repairing of houses in the city of Louisville, are favored by the law, and

a preference is given to them over other debts of the owners of the property, to the extent of the value of the property improved which has not been previously incumbered.

By causing the house to be erected, Howard created a lien, or a *bona fide* incumbrance, upon it, in favor of the mechanic who constructed said house, for the amount due him therefor, available and enforceable by the statute *supra*, and is an incumbrance within the meaning of *chap. 36, art. 15, of the Revised Statutes*. And, as this incumbrance on the property was created before a lien was created by the executions of Duvall & Co. and J. Watson on the same property, the purchaser at the sale under said executions, and his vendee, only acquired a lien on the property for the purchase money and interest, after the rate of *ten per centum per annum* from the day of sale till paid.

Appellees instituted this suit under *sec. 2, chap. 36, art. 15, of Rev. Statutes, supra*, before the purchaser had *by suit* removed the incumbrance.

It is true the property was not levied upon and sold as incumbered property, and, since the sale, Brown has removed the incumbrance which was upon it; but he did not thereby acquire an absolute title to it; his rights are not determined by the character of the levy or the manner of making the sale, but by the character of estate the defendant in the execution had in the property sold. If he had, by mortgage, deed of trust, or otherwise, created a *bona fide* incumbrance upon it before the execution under which it was sold had created a lien on it, all that Buford or his assignee acquired by his purchase was a lien on the property for his purchase money, with interest at the rate of *ten per centum per annum* from the day of sale till paid; and this is the only right which can be acquired under such a purchase. (*Forrest vs. Phillips, &c., 2 Met. Ky. R., 104.*)

Appellant, having sold the property to Wellman before appellees brought their suit, the chancellor permitted the sale to stand, and rendered a personal decree against him, which was

not prejudicial to appellant; and, as his decree in all other respects conforms to the views herein expressed, the same is affirmed.

CASE 30—PETITION EQUITY—SEPTEMBER 29.

Story, &c. vs. Graham.

APPEAL FROM THE FLEMING CIRCUIT COURT.

1. In July, 1861, a debtor conveyed 70 acres of land to a creditor, in payment of \$1,000 due him. In November afterwards, he conveyed the residue of his land to sureties, in consideration of their agreeing to pay debts, amounting to \$5,020, for which they were bound for him. At the time of the first conveyance he owned no property subject to his debts except the lands, and his debts amounted to over \$12,000. The lands were worth about \$6,000. *Held*, That the conveyances were made in contemplation of insolvency, and for the purpose of preferring some of his creditors over others.

2. *Quere*. Must a creditor, who attacks conveyance by his debtor upon the ground that it was made in contemplation of insolvency and with the design to prefer certain creditors, allege in his petition that the conveyance was made within six months before the commencement of the action?" (*See 2 Met.*, 146; *Ib.*, 457.)

ANDREWS & COX, for Story, &c., cited 1 *Met.*, 450.

WM. S. BORTS, for Graham, cited 1 *Met.*, 457.

W. H. CORD, on same side, cited 2 *Met.*, 52; 3 *Met.*, 399; *Ib.*, 539; 5 *Dana*, 220; 1 *Met.*, 450; 3 *Story's Rep.*, 453; 2 *Ib.*, 340, 360; 2 *Laurence*, (Ohio) 400; 18 *B. Mon.*, 312; 1 *Met.*, 632; 3 *Met.*, 450; 14 *B. Mon.*, 403; *Parson's Mercantile Law*, 304, note 4; 9 *B. Mon.*, 189; 3 *Met.*, 48, 51; *Civil Code*, sec. 153; 4 *Dana*, 331; 8 *Ib.*, 81; 14 *B. Mon.*, 533; 8 *Ib.*, 11; 2 *Barn. & Adol.*, 93; 14 *B. Mon.*, 290; 9 *Dana*, 77; 3 *Mon.*, 86; 3 *Met.*, 95.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Graham brought this action on the 1st of January, 1862, for the purpose of subjecting property formerly belonging to

Allen Story to the payment of his debts, according to the provisions of the act of 1856, entitled "an act to prevent fraudulent assignments in trust for creditors and other fraudulent conveyances." (1 *Stan. Rev. Stat.*, 553.)

It is alleged and proved, that, in July, 1861, Allen Story conveyed 70 acres of land to the appellant, McKee, in payment of \$1,000 due to him; and that, in November, 1861, he conveyed the residue of his land to the appellants, Meshac Story and Newman, in consideration of their agreeing to pay debts to the amount of \$5,020, for which they were bound as his sureties; and it is alleged that he made these conveyances in contemplation of insolvency, and for the purpose of preferring some of his creditors over others.

It is also alleged that said Allen Story conveyed two slaves to Meshac Story, in consideration of the latter's agreement to pay \$900 upon a debt for which he was bound as surety for the former; but the petition does not allege when this conveyance was made. Meshac Story answers that it was made January 20, 1860, and at the time when he became surety upon said debt; but there is no proof of those facts. In his answer, he refers to the bill of sale of the slaves, and says it is filed as part thereof. We find in the record what purports to be a copy of such a paper; but the record does not show that it was read as evidence in the court below; nor was there any proof of its execution or delivery.

The court below held the lands subject to the provisions of the act of 1856, from which judgment Meshac Story and others appealed, and dismissed the petition as to the slaves, to reverse which judgment Graham prosecutes a cross appeal.

It does not appear that, at the time of the conveyance to McKee, Allen Story owned any property, subject to the payment of his debts, except the lands above mentioned. There is no evidence on the subject except the report of the commissioner, who says that "the estate other than land is insignificant, amounting to but a few hundred dollars at most."

Said lands were worth about \$6,000, and, at the time of the conveyance to McKee, Allen Story's debts amounted to over \$12,000. In a case quite similar to this, in which one Apple-

gate, owning property worth about \$4,000, and being indebted to the amount of about \$10,000, executed a power of attorney, by means of which he preferred one of his creditors, this court said: "In view of the limited circle of Applegate's business, of the excess of his liabilities over his assets and of the suits against him, he must be regarded as having known that he was insolvent, when he executed the power of attorney. The statute would be of little value to creditors, if the courts should require them to produce stronger evidence than the facts above mentioned in order to prove a debtor's knowledge of his insolvency." (*Applegate and others vs. Murrill and others*, June, 1862.)

The mere fact that Allen Story's debts amounted to twice the value of his property, would perhaps suffice to prove that he made the deed to McKee, with the intent to prefer him, and in contemplation of insolvency. This conclusion is strengthened by the fact, that, in November following, he conveyed the residue of his property, worth about \$5,000 to Newman and Meshac Story, to secure the payment of debts to that amount, leaving over \$6,000 of debts unprovided for, and reserving nothing to pay upon them. If the two conveyances, disposing of the whole property of the debtor, to pay in full half of his debts, leaving the other half unprovided for, had been made at the same time, there would have been no room for doubt, that each was made in contemplation of insolvency. Though the conveyance to Newman and Meshac Story, having been made in November, does not bear as heavily upon the conveyance to McKee, as if both had been made in July, it seems entitled to some weight. Debtors, wishing to elude the provisions of the act of 1856, will perhaps, often proceed gradually, making several conveyances at different times, to effect their objects. In our opinion, the court below correctly decided, that the conveyance to McKee was made in contemplation of insolvency.

According to the opinion expressed by this court, in the case of *Wintersmith & Young vs. Poynter & Conway*, 2 Met., 447, Graham's petition concerning the slaves conveyed to Meshac Story, was properly dismissed, because it did not allege that the conveyance was made within six months before the commence-

Story, &c. vs. Graham.

ment of the action. But the facts in that case did not require an expression of opinion upon that point, because the petition not only failed to show that the conveyance was made within six months, but distinctly showed that it was made more than six months, before the commencement of the action, and, consequently, that the plaintiffs had no right to maintain the action. We need not decide, however, whether that *dictum* ought to be followed, or whether it should be overruled, as being, perhaps, in conflict with the decision in *Chiles vs. Drake*, (2 Met., 146,) and with the general doctrine, that the plaintiff is not bound to aver that his cause of action accrued within the period of limitation, but that the burthen of showing that it is barred rests on the defendant; because if Graham was not bound to show that the conveyance of the slaves was made within six months before the filing of his petition, he was certainly bound to show that it was made in contemplation of insolvency, and failed to do so. Such a fact might be proved without showing the date of the transaction, as, for instance, by proving declarations of the grantor to the grantee, at the time of the conveyance, that it was made to prefer him, and in contemplation of insolvency. But there is no such evidence in this case. The only evidence that either of the conveyances was made in contemplation of insolvency, is the evidence as to the amount of the grantor's debts and the value of his property. But that evidence is unsatisfactory as to the conveyance of the slaves, as it does not appear when that conveyance was made nor what was then the grantor's pecuniary condition. We cannot assume, because he was insolvent in July, 1861, that he was insolvent one or two years before, or at any other indefinite time.

It is not proved, as is suggested by counsel, that Allen Story continued in possession of the slaves. We need not, therefore, express an opinion as to the effect which that fact, if established, would have produced in a proceeding of this kind.

The judgment is affirmed, upon the original and cross appeal.

Fairbairn, &c. vs. Means, &c.

CASE 31—EJECTMENT—SEPTEMBER 29.

Fairbairn, &c. vs. Means, &c.

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APPEAL FROM THE LEWIS CIRCUIT COURT.

1. An occupant of land, to be entitled to pay for his improvements, under the occupying claimant law, should deduce a title from the commonwealth. He need not show a valid title. He must show that he believed himself to be the owner of the land by reason of a claim, in law or equity, founded upon a grant from the commonwealth; and, in order to do so, must connect himself with the grant by showing that he held the title which it granted. (*Rev. Stat., chap. 70, sec. 1; 4 Bibb, 461; 2 A. K. Mar., 214.*)

2. The statute *supra* does not make the right of a claimant depend upon his belief concerning his title.

3. That the occupant holds under those claiming under a deed from the sheriff, made in pursuance of an unauthorized sale of the land for taxes alleged to be due from a patentee, does not make him an occupying claimant within the meaning of the statute.

W. H. WADSWORTH, for appellants, cited 4 *Bibb*, 461; 5 *Litt.*, 20; 1 *Met.*, 624.

THOS. JOYCE, on same side, cited 4 *Bibb*, 479.

E. F. DULIN, for appellees, cited 1 *Litt. Laws Ky.*, 642; 2 *Id.*, 963; 2 *Stat. Law*, 1231; *Rev. Stat., chap. 20; 5 Litt.*, 21; 4 *Bibb*, 52, 56.

W. C. IRELAND, on same side, cited 4 *Bibb*, 52; 3 *Mon.*, 58; 5 *Id.*, 97; *Rev Statutes, chap. 70; 2 Stat. Law*, 1231; 1 *Mon.*, 236; 5 *Litt.*, 21; 5 *Mon.*, 590; 1 *Mar.*, 42; 4 *Bibb*, 395; 1 *Litt.*, 412.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

The appellants obtained a judgment against the appellees for a tract of land, claimed by the appellants as heirs of the patentee, Daniel Henry.

The appellees claimed the land, or most of it, under a junior patent to one Bryant. One of the links in their chain of title is a deed alleged to have been executed, in 1815, by the sheriff of Greenup county, conveying the land to John Young, in pursuance of a sale of it to him, in 1806, by the sheriff of said county, for taxes alleged to be due from Bryant to the Commonwealth for the year 1804. Young's interest in the land

Fairbairn, &c. vs. Means, &c.

was passed to the appellees by several successive conveyances, properly executed and recorded. But it does not appear that the sheriff had authority to sell the land for taxes. On the contrary, it was proved, by the auditor of the State, that no list of said land for taxes, for the year 1804, or any other year, was registered in the auditor's office or returned thereto, as required by the 7th section of the act of 1797. (2 *Litt. L.*, 319.) In view of this evidence, and in the absence of proof that such list was delivered to the sheriff, or to the clerk of the county court, as directed by said section, it must be assumed that the sheriff had no authority to make the sale.

The only question that we need to consider is, whether or not, under the circumstances mentioned, the appellees are "occupying claimants," and as such entitled to the benefit of *chapter 70 of the Revised Statutes*, the 1st section of which thus describes those for whom it provides: "If any person, believing himself to be the owner, by reason of a claim, in law or equity, the foundation of which being of public record, hath, or shall hereafter, peaceably seat and improve any land, but which land shall, upon judicial investigation, be decided to belong to another, the value of the improvements shall be paid by the successful party to the occupant," &c.

The appellees contend that, though they did not acquire Bryant's title, yet, as Young claimed it, and as they acquired Young's supposed right to it, they *believed* that they owned it, and are, therefore, entitled to the benefit of the statute.

Even if the belief of a claimant, that he owned the land, could bring him within the statute, we could not, perhaps, decide that the appellees are within it, because, upon the facts before us, it seems impossible for us to decide what was their belief on that subject. The fact that they purchased Young's claim does not prove that they regarded it as valid. The desire to extend their possession to a certain boundary, or to connect their possession with that of Young, or his vendors, or some other motive, may have induced them to purchase his claim, though they may have believed or known that he did not hold Bryant's title.

But, in our opinion, the statute does not make the right of a claimant depend upon his belief concerning his title. Had it done so, the question, whether the junior patentee, before obtaining his patent, or his vendee, before purchasing, had notice of the senior patent, would be material in such cases. We have seen no case, however, in which that question was deemed material. It would be impossible for the court, in any case, to determine what was the secret belief of a claimant concerning his title. The belief referred to in the statute is a belief which may be judicially ascertained, and which, therefore, must be founded upon the fact that the occupant holds a title granted by the Commonwealth. Of course he need not show that he has a valid title. The statute was designed to relieve occupants holding apparent, but invalid, titles granted by the Commonwealth. It is sufficient for the claimant to show that he held such an apparent title when he improved the land. But it is not sufficient for him to show that he apparently held such an apparent title. It is clear, from the language of the statute, that "believing himself to be the owner" is not sufficient to entitle the occupant to the benefit of its provisions. He must so believe "by reason of a claim, in law or equity, the foundation of which [is] of public record." The "foundation" referred to by the statute is a grant from the Commonwealth. (*Clay vs. Miller*, 4 Bibb, 461; *Lewis' heirs vs. Singleton's heirs*, 2 A. K. Mar., 214.) The claimant must, therefore, show that he believed himself to be the owner of the land, by reason of a claim founded upon a grant from the Commonwealth. In order to do so, he must, necessarily, connect himself with the grant, by showing that he held the title which it granted.

In *Lewis' heirs vs. Singleton's heirs* it was held that the statute was intended to apply only to contests between claimants under different grants from the Commonwealth, and not to contests between adverse claimants under the same patent; and the court said: "Consistent with this intention, we conceive, are the expressions of the act in question, '*supposing them to be his own*, by reason of a claim in law or equity, *the foundation of such claim* being of public record.' If, in scrutinizing

his title, either legal or equitable, he could arrive at the foundation, without defects, in some public record, or, in other words, in some office where the appropriation was allowed to be made, he should then claim under the act," &c.

In *Clay vs. Miller* the facts are, that Williams, claiming the land in contest under the patent of Russell, conveyed it to the defendant, Miller; but it was proved that Russell's patent did not include the land. The court, attaching no importance to the question, whether or not Miller believed himself to be the owner of Russell's title, said: "If the claim should be deduced from the Commonwealth, it is perfectly clear that Miller has not brought his case within the law: for, although he claimed the land under a deed regularly recorded, and that deed actually covers the land in contest, yet it is incontestably shown that Williams, from whom he obtained the deed, had neither a legal nor equitable title. Williams, it is true, claimed the land through Russell, who is shown to have held a patent from the Commonwealth; but it is clearly proved that Russell's patent does not include the land on which the improvements were made. The foundation of Miller's claim is, therefore, the deed from Williams, unconnected with any deduction of title from the Commonwealth; and as such we cannot suppose that he has brought himself within the occupying claimant law."

Those cases arose under the act of 1812, (2 S. L., 1231,) the provisions of which, with reference to the question under consideration, are substantially the same as those of the Revised Statutes. Though they differ from this case, we regard them as proving that the question here is, not whether the appellees believed themselves to be the owners of a title granted by the Commonwealth, but whether or not they were the owners of such a title.

The appellees having failed to "arrive at the foundation," contemplated by the statute, having failed to deduce a title from the Commonwealth, and having held the land, not under Bryant's patent, but under Young's deed and adversely to Bryant's title, their case is not within the statute.

Ransdall vs. Shropshire.

The judgment is reversed, and the cause remanded with directions to quash the inquest, and for other proceedings not inconsistent with this opinion.

CASE 32—PETITION EQUITY—SEPTEMBER 30.

Randall vs. Shropshire.

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APPEAL FROM THE BOURBON CIRCUIT COURT.

1. Section 106 of the *Civil Code*, which provides that every action, except those enumerated in the previous sections, "may be brought in any county in which the defendant, or one of several defendants, resides or is summoned," does not change materially the former law on the same subject. It does not authorize judgment by default against a defendant served in another county, except where the cause of action is local, or where it affects himself and another served in the county where the action is brought.

2. An objection to the misjoinder of causes of action is waived unless taken in the manner provided by the *Civil Code*; yet such misjoinder cannot have the effect to give the circuit court jurisdiction over a claim improperly joined against a defendant served in another county, and to render judgment by default against him, although the other defendant is served in the county where the action is brought.

3. Allegations, which amount to nothing more than the mere statement of a legal conclusion, are insufficient.

J. A. PRALL, for appellant, cited *Civil Code*, sections 118, 120, 123; *Wilkes, Sheridan, &c. vs. Morehead, Mss. Opin.*, September, 1856.

HARLAN & HARLAN, for appellee, cited 3 *Dana*, 34; *Title 5, Civil Code*; *Forkner vs. Hart, Mss. Opin.*, June, 1856; *Wilson vs. Thompson, Mss. Opin.*, June, 1858; *Civil Code*, sec. 113; 18 *B. Mon.*, 555; *Chism vs. Woods, Hardin*.

CHIEF JUSTICE DUVAL DELIVERED THE OPINION OF THE COURT:

Shropshire, as the committee of Porter, a lunatic, brought this action, in the Bourbon circuit court, against Mahoney and Ransdall, setting out three separate and distinct causes of action, in as many separate paragraphs, in his petition.

In the first paragraph, the plaintiff seeks to rescind a sale of land which had been made by Mahoney to Porter.

In the second, it is alleged that Mahoney had "got possession of a note for \$500, in favor of said Porter, on the defendant, John Ransdall, due 1st March, 1858; said Mahoney collected on said note about \$318, and defendant, Ransdall, paid it to him, although he had no authority to collect the sum, and said Mahoney still has the note in his possession." "He prays judgment for said note against Ransdall, and, if he is not entitled to a judgment against him, he prays judgment against Mahoney for the \$318, collected by him as before stated," &c.

In the third paragraph, the plaintiff seeks to recover on a note for \$100, which Mahoney had executed to Porter.

Process was served on Mahoney in Bourbon county, and on Ransdall in Henry county.

The court below, (neither of the defendants having appeared,) rendered a judgment rescinding the sale and purchase of the land; and also separate judgments against Ransdall and Mahoney, for the full amount of the notes set up against them respectively, in the second and third paragraphs of the petition. Ransdall has appealed from the judgment against him.

The record presents a palpable case of misjoinder of causes of action. The claim against Ransdall had no sort of connection with either of the two causes of action against Mahoney. But, as no objection on that ground was made in the court below, it must be deemed to have been waived. (*Civil Code, sec. 114.*)

The question arises, however, whether the effect of such misjoinder was to give the court below jurisdiction over the claim against the appellant, who was served with process in a distant county from that in which the action was brought. For the appellee it is insisted that, as *one of the defendants to the action* was summoned in the county of Bourbon, that court had jurisdiction as to the other defendant, under *section 106 of the Code*, which provides that every action, "except those enumerated in the previous sections, "may be brought in any county in which the defendant, or one of several defendants, resides or is summoned."

This provision does not change materially the former law on the same subject. The object was, and is, to prevent the inconvenience and hardship, which would result from compelling a party to appear and defend a civil action in any county in the State, however distant from his residence or from the county in which he might be summoned. He may be subjected to this hardship only in cases where the cause of action is local, or where it effects himself and others.

The literal construction now contended for, is, we think, inconsistent with the spirit and meaning of the statute, and would practically defeat its object. It would allow a plaintiff to unite in his petition any number of causes of action, however unconnected, either in respect to the parties, or to the nature of the demands, and by the service of process on one of the *defendants*, in the county in which the action is brought, the plaintiff will be entitled to judgment against all the others, wherever summoned, unless they appeared and objected to the misjoinder. Several causes of action are allowed to be united in the same petition only, "where each affects all the parties to the action, may be brought in the same county," &c. (Sec. 111.) The plaintiff has, in the present case, violated that provision by uniting in his petition several causes of action, neither of which affects all the parties, and all of which could not have been brought in the same county; and, as a consequence of such violation, claims to be entitled to judgment against the appellant on the sole ground that he is a defendant, although improperly so. This would be, in effect, to allow the violation of one provision of the Code to constitute a reason for the violation of another.

It is proper to add, that the allegations of the second paragraph, in relation to the payment of the \$318, are not sufficient to deprive the appellant of the benefit of that payment. It is merely stated that Mahoney had got possession of the note in question. But when, or *how*, he got it, whether rightfully or wrongfully, whether by assignment or by mere delivery, or for what purpose the possession was obtained, does not appear. It is alleged that Mahoney "had no authority to col-

 Buckles, &c. vs. Lambert.

lect the sum;" but the facts from which such want of authority would result are not stated, and this allegation, therefore, amounts to nothing more than the mere statement of a legal conclusion. Mahoney, as between himself and Porter, may not have had legal authority to collect the note, but it would not necessarily follow that the payment to him, by the obligor, without notice of the want of authority, would have been invalid. So that the judgment must be deemed erroneous, even if the court had had jurisdiction as to the appellant.

But, for the reasons before stated, the judgment against the appellant must be reversed, and the cause remanded with directions to set aside the same and to dismiss the action as to him.

 CASE 33—PETITION ORDINARY—SEPTEMBER 30.

Buckles, &c. vs. Lambert.

APPEAL FROM THE HARDIN CIRCUIT COURT.

1. The court of appeals will not reverse a judgment on account of the error of the circuit court in refusing, on motion, to strike out irrelevant or redundant matter in a pleading, if it do not appear that the appellant was prejudiced thereby. (*Civil Code, secs. 147, 161.*)

2. The decision in *Waller, &c. vs. Martin*, (17 B. Mon., 188,) that, in an action on *delicto* against several defendants, some of whom were, and some of whom were not summoned, there could be a trial as to the former, and judgment against them, without any disposition of the case as to the latter, is, in effect, overruled by the decision in *Hedger vs. Downs*, (2 Met., 160.) This ruling does not apply where all are summoned. (*Civil Code, sec. 402.*)

3. If several persons jointly commit a tort the plaintiff, in general, has his election to sue all or some of the parties jointly, or one of them separately. This rule has not been changed by the Civil Code.

4. In an action against several defendants, for assault and battery, they filed separate answers; a joint verdict was rendered against them, and judgment entered ac-

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ordingly. A new trial was granted as to one, (an infant, because no guardian *ad litem* had been appointed,) and refused as to the others, against whom the judgment was allowed to stand for the sum named in the verdict. The judgment is *affirmed*, (Judge Williams dissenting.) (*Civil Code*, sec. 402; 15 *B. Mon.*, 547.)

6. See the dissenting opinion of Judge Williams.

HARLAN & HARLAN, for appellant, cited 3 *Mar.*, 337; 16 *B. Mon.*, 356; 4 *J. J. Mar.*, 269; 4 *Litt.*, 134; 3 *Mon.*, 137; 1 *J. J. Mar.*, 198; *Civil Code*, sec. 399.

WILSON, on same side, cited 3 *Mar.*, 337; 16 *B. Mon.*, 356; 4 *J. J. Mar.*, 269; 4 *Litt.*, 134; 3 *Mon.*, 137; 1 *J. J. Mar.*, 198.

C. G. WINTERSMITH, for appellee, cited *Civil Code*, secs. 347, 398; 17 *B. Mon.*, 188; *Fleety vs. Bell*, *Mss. Opin.*, December, 1855.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT: (JUDGE WILLIAMS dissenting.)

Lambert sued Ambrose Buckles and the appellants, John and James Buckles, for an assault and battery. They filed separate answers. The jury found a joint verdict against them for \$825, and a judgment was entered accordingly. On the same day the defendants moved for a new trial, which was granted to Ambrose, because he was an infant and no guardian *ad litem* had been appointed for him, and refused to John and James, against whom the judgment was allowed to stand for the sum named in the verdict. To reverse that judgment they appeal.

We need not consider the instructions, as the bill of exceptions does not show that the appellants excepted to the action of the court with reference to them.

James Buckles made his answer a counter-claim against Lambert, who filed a reply thereto, not merely denying its allegations, but giving a detailed statement concerning the origin and progress of the difficulty between him and the defendants. They moved to strike out part of the reply, upon the ground that it contained irrelevant matter, and it is contended that the court erred in overruling that motion.

Section 147 of the Code, which declares, that, "if irrelevant or redundant matter is inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby, at

the cost of the party whose pleading contained it," is an enactment of an old rule of practice, which made it the duty of the court to strike out irrelevant or redundant matter, upon a motion made for that purpose. In our opinion, that part of the reply, which the defendants moved to strike out, contains irrelevant and redundant matter, and their motion should have prevailed. But we cannot reverse the judgment on account of the error of the court in overruling it, because we do not perceive that the defendants were prejudiced thereby. We are required to "disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party." (*Code, sec. 161.*) It is contended, however, that the jury may have regarded those statements of the reply as evidence for the plaintiff. But it is clear that they had no right to do so, and we cannot assume that they violated their duty.

It is contended that the court erred in rendering a judgment against the appellants, without disposing of the cause as to the other defendant.

We have no doubt that this would have been erroneous under the old practice; but, in our opinion, the practice has been changed by the Code.

Section 392 declares, that "an action upon contract, wherein the summons has been served in due time, as provided in *section 135*, upon part only of the defendants, shall stand for trial at the first term as to those so summoned, and may be continued as to the others for further proceedings. In other actions, by ordinary proceedings, the plaintiff can only demand a trial at any term, as to part of the defendants, upon his discontinuing his action on the first day of such term as to the others."

In an action *ex delicto* against several defendants, some of whom were, and some of whom were not, summoned; there was a trial as to the former and a judgment against them, without any disposition of the case as to the latter; and it was held, that, "as the plaintiff might have maintained his suit against any number of the defendants, and was, by the Code, entitled to a judgment against some without disposing of the case finally as to others, it is no available objection to the judgment that no notice is taken of the defendants, who were

not served with process, and no express disposition made of the case as to them." (*Waller, &c. vs. Martin*, 17 B. Mon., 188.) But that decision was, in effect, overruled in a similar case, in which it was held that the provisions above cited, from section 392, apply only to cases in which some of the defendants have been summoned and others not summoned, and that in actions *ex delicto* it is erroneous to render a judgment against the former, without discontinuing the case as to the latter on the first day of the term. (*Hedger vs. Downs*, 2 Met. Ky. Rep., 160.) Those provisions, therefore, do not apply to the case under consideration, because here all the defendants were summoned.

But we do not perceive how this case can be relieved from the operation of section 402, which declares that, "though all the defendants have been summoned, judgments may be rendered against any of them severally, where the plaintiff would be entitled to judgment against such defendants if the action had been against them alone."

In view of the context, our opinion is, that this section does not require separate judgments against each defendant, but that it authorizes several separate or joint judgments against one or more of the defendants, as the case may require.

By the common law, "if several persons jointly commit a tort, the plaintiff, in general, has his election to sue all or some of the parties jointly, or one of them separately, because a tort is in its nature a separate act of each individual." (1 Ch Pl., 86.) This rule has not been changed by the Code. As Lambert could have sued the appellants alone, and would, in such an action, have been entitled to a judgment against them for the damages he sustained, they have no right to complain because Ambrose Buckles was not included in the judgment.

It has been suggested that the judgment is erroneous because it does not conform to the verdict, which was against all the defendants, whilst the judgment is against two only. But a majority of the court, (Judge Williams dissenting,) regard the decision in *Shelton, &c. vs. Harlow*, (15 B. Mon., 547,) as conclusive upon this question. That was an action for damages against four defendants. The jury found a joint verdict

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against them. Upon their motion for a new trial, the court, being of the opinion that there was no evidence against one of them, put the plaintiff upon terms that the suit should be dismissed as to him, which was done, and a judgment was rendered against the others for the amount of the verdict; and the judgment was affirmed.

Whether or not Lambert can now proceed against Ambrose Buckles, is a question upon which we express no opinion.

In view of the evidence, we cannot reverse the judgment upon the ground that the damages are excessive.

The judgment is affirmed.

JUDGE WILLIAMS, dissenting from the opinion of the majority of the court, delivered the following opinion:

With all due deference to the majority of the court, I must dissent from the opinion in this case.

By the rules of the common law, juries were not authorized to give several damages in a joint action against trespassers, save in a very peculiar class of cases where a joint action against several trespassers could be maintained. (*See 3 Mon., 137; 1 J. J. Mar., 361; 4 J. J. Mar., 269.*)

If the jury should assess several damages against joint trespassers, the plaintiff might either take a judgment against all for the amount of some one assessment, and disregard the others; or, he might remit all but the one, and take a joint judgment for that; or, he might dismiss the parties, not included in the assessment, that he should elect to take judgment on. This was evidently founded on the principle of law that each joint trespasser was liable for the whole trespass; and, the jury having found all guilty, should have found a joint verdict. Consequently there was no violence done either defendant in rendering judgment for the amount of either one of the assessments.

Experience had shown that parties who had barely committed acts sufficient to convict them of being joint trespassers were often mulct in heavy damages by reason of the lawless conduct of some co-defendants, whilst, on the other hand, plaintiffs were some times deprived of heavy damages against lawless defendants, because some co-defendant's conduct was

of such character as to disincline the jury to award heavy damages against him. To avoid those hardships to the parties, the Legislature, by the act of 1839. (3 *Stat.*, 573,) authorises several damages; and which enactment is still in force.

In *Shelton, &c. vs. Harlow*, (15 *B. Mon.*, 547,) three defendants were jointly sued. The evidence connected two, but there was no evidence against Roberts; yet the jury gave a joint verdict, (perhaps through mistake or inadvertency.) On a motion for a new trial the court put the plaintiff to her election to dismiss as to Roberts, else give a new trial. She having elected to dismiss, the motion as to the others was overruled. The verdict in this case should have been against the two defendants proven guilty. As Roberts was not proven guilty, it was impossible that his being a defendant, or that his conduct, should have enhanced the damages. Therefore the guilty defendants had no right to complain, because the judgment was upon the verdict, as the law required it should have been rendered, and fully sustained, in analogy to that principle alluded to, which authorised a plaintiff to take his judgment on either, where there were several assessments.

In the case under advisement, the evidence established the guilt of all the defendants; the jury found a joint verdict for \$825. The number and conduct of all the defendants, and that it was a final finding as to all, was considered by the jury, and well calculated to enhance the damages; the plaintiff had gotten the advantage of all these, and the jury awarded to him full damages in consideration thereof. Yet by an irregularity of his own, in not having a guardian *ad litem* appointed for a minor defendant, his verdict and judgment are defective.

The court below, granted to the minor a new trial, without putting the plaintiff on his election, and overruled the motion for a new trial as to the other defendants. The judgement is certainly a departure from the verdict, and this departure not to sustain any known principle of law, but in contravention thereof. It is not to make the judgment conform to what the verdict should have been, for there is no legal standard by which to say what the verdict would have been, or should have been, had not this minor defendant also been put on trial.

The jury have said in their verdict that plaintiff should recover against all these defendants \$825. The court has said, by its judgment, that he shall recover against two of the defendants \$825—and may hereafter recover of the other defendant another \$825—if a jury shall so award; for, in answer to this, it will not do to say that the judgment bars further proceedings as to the minor defendant. This court has virtually decided otherwise in the case of *Green vs. Redman*, *Mss. opin.*, Oct., 1857.

It is attempted to uphold this judgment by virtue of *sec. 402 Civil Code*, which is in these words: "Though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against said defendants if the action had been against them alone." The rule of practice under the common law was that in a joint action of trespass the plaintiff could not proceed to trial against some of the defendants and continue as to others. This section of the Code doubtless changed that rule of practice; and this is its whole effect, as intended by the legislature, in all probability. It certainly was not intended to cure an irregularity, though such was decided in *Waller, &c. vs. Martin*, (17 B. Mon., 188,) which case was very properly overruled in *Hedger vs. Downs*, (2 Met., 160.) If it could not cure an irregularity, where the party had not been summoned, it is hard to perceive how it can cure an irregularity where a party has been summoned. It certainly gives a plaintiff the right to go to trial against a part of the defendants, but does not cure irregularities committed on the trial.

It is not perceived how this irregularity could have been cured, even by putting the plaintiff on his election either to dismiss the suit as to the minor defendant or to give a new trial to all the defendants.

The jury, by their verdict, have found a gross sum against all the defendants, the court, by its judgment, has said it is only against two. The jury have said that \$825 shall be full compensation to plaintiff against all the defendants; the court says it shall only be so, as to part of them. The jury has said

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the payment of \$825 shall be a finality between the parties; the court says it shall not. The court, by its judgment, rewards the plaintiff for his neglect, error and folly, with an opportunity to recover a further sum, and makes an erroneous and defective verdict and judgment more valuable to him than if these had been perfect. Such was never intended by the law.

In a joint verdict and judgment against joint trespassers the law requires that the plaintiff shall be able to sustain them as to all, or they will be good as to none. Such is the law in my opinion.

 CASE 34—PRIVATE PASSWAY—SEPTEMBER 30.

Troutman, &c. vs. Barnes.

APPEAL FROM THE NELSON CIRCUIT COURT.

1. The order awarding a writ of *ad quod damnum*, upon an application to establish a private passway, must name the day on which the inquest is to be held, which must also be inserted in the writ—and the omission is fatal error. (*Rev. Stat., chap. 84, art. 1, sec. 7; 2 Revised Statutes, page 299; 3 Mon., 50.*)

WM. JOHNSON, for appellants, cited 2 *Rev. Stat., page 294, sec. 40; Ib., 296, sec. 10; Ib., 285, sec. 3; Ib., 295, sec. 3; Ib., 287, sec. 7; Ib., 295, sec. 5; 3 Met., 70; 2 J. J. Mar., 74; 3 Mon., 51; 4 J. J. Mar., 40; 2 Bibb, 4; 3 B. Mon., 300.*

ELLIOTT & MCKAY, on same side.

A. J. JAMES, for appellee, cited 2 *Revised Statutes, sec. 10 of art. 2, on page 296.*

J. W. MUIR, on same side, cited *Act of Feb. 13, 1858.*

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

The county court of Nelson county, on the application of appellee, established a private passway, for his benefit, over the lands of appellant, from which judgment they appealed to

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the Nelson circuit court, and, that court having affirmed the judgment of the county court, they have brought the case to this court.

Numerous objections are taken to the proceedings, by appellants' counsel, commencing with the order appointing the viewers, and closing with the final judgment. But, as we are of opinion that none of the objections are available, except that one which relates to the order of the county court awarding the writ of *ad quod damnum*, that alone will be noticed.

Section 7, art. 1, chap. 84, 287, vol. 2, *Rev. Statutes* provides that a writ of *ad quod damnum* shall be awarded, if desired by any proprietor or tenant, or if the court see cause for awarding the same. Such writ shall command the proper officer to summon and impanel a jury of free-holders of the county, not related to either party, and not residing within one mile of the proposed road, to meet on the lands of the proprietors and tenants, over which it is proposed for the road, or the alteration in the road, to run, at a certain time and place, of which notice shall be given them by the officer.

This section is, by statute, made to apply to passways as well as to roads, &c. (Page 299, 2 vol. *Rev. Statutes*.)

The phrase, "at a certain time," as expressed in the *sec. supra*, certainly means a definite time, a particular day, to be named in the writ on which the jury is to be summoned to hold the inquest; which day should be named in the order of the county court when the writ is awarded.

The writ which issued in this case fails to name the day on which the jury shall meet. At that point there is a blank; and it is left entirely to the discretion of the officer, charged with the execution of it, to determine when the inquest shall be held. This, we think, was not the design of the Legislature.

This court, in the case of *Irvin & Taul vs. Scobee*, (3 Mon., 50,) held, in a proceeding to obtain leave to erect a mill and dam on a water course, that the order awarding the writ of *ad quod damnum* was not sufficient, because the day on which the inquest was to be held was not named. The language of the statute, under which the proceedings in that case were had, in relation to awarding the writ of *ad quod damnum*, differs some-

what from the language, in relation thereto, of the statute regulating the proceedings in this case—being more explicit in the former than in the latter statute—but they both, as we understand them, require the day on which the inquest shall be held to be inserted in the writ, and a failure to do so is a fatal error, as was held in the case *supra*.

Wherefore, the order and judgment of the circuit court is *reversed* and cause remanded, with directions to *reverse* the order of the county court establishing said passaway.

CASE 35—PETITION EQUITY—OCTOBER 1.

Sheets et ux vs. Grubbs' Executor.

APPEAL FROM THE MONTGOMERY CIRCUIT COURT.

1. The word *children* does not ordinarily denote *grand children*, and is never so construed except in cases where it is indispensably necessary to effectuate the obvious intent of the testator. (2 Met., 466.)

2. A devise to "the children" of the testator's sister, one of whom was dead at the time of the execution of the will, passes nothing to the descendants of such decedent.

K. FARROW and BROCK & CLARKE, for appellants cited *Rev. Statutes, chap. "Wills," sec. 18; 10 B. Mon., 172; 11 B. Mon., 93; 2 Rev. Statutes, chapter "Heirs and devisees;" 1 Met., 301.*

THOS. TURNER, for appellee, cited *2 Met., 466; Roper on Legacies, 69; Jarman on Wills, 51; 9 Dana, 2; 9 B. Mon., 204; 12 Ib., 115; 2 Rev. Statutes, page 461.*

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT: (Judge Peters did not preside in this case.)

By the sixth clause of the will of Thomas Grubbs, dec'd., he devised to the children of his sister, Mourning Boone, an equal

4m339
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88 91
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share, with the balance of his brothers and sisters, of his estate not otherwise disposed of.

Mrs. McClinsey, one of the children of Mourning Boone, died before the death of the testator, and, as must be assumed, before the execution of the will, leaving an only child, Mrs. Sheets, the present appellant.

The court below decided, in effect, that none of the children of Mourning Boone, or their descendants, who died prior to the execution of the will, were entitled to anything under the devise to her children. From that judgment Mrs. Sheets and her husband have appealed.

For the appellants it is insisted that Mrs. Sheets, as the representative of her mother, Mrs. McClinsey, occupies the same position, under the will, that the latter would occupy if living, and is entitled to the share which the mother, if living, would have been entitled to, as one of the children of Mourning Boone.

In support of their claim they rely upon the following provision of the Revised Statutes:

"Where a devise is made to several as a class, or as tenants in common, or as joint tenants, and one or more of the *devisees* shall die before the testator, and another or others shall survive the testator, the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the deviser." (*Sec. 1, art. 2, page 1.*) "If a *devisee* or *legatee* dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will." (*Section 18, page 461.*)

The entire argument for the appellants proceeds on the assumption that the mother of Mrs. Sheets was embraced in the devise to "the children of Mourning Boone," and was, therefore, a *devisee* or *legatee* under the will. If this assumption was maintainable, there could be no doubt that the statutes refer-

red to would apply, and would sustain the claim asserted by the appellants.

The only question to be decided, then, is whether Mrs. McClinsey was a devisee or legatee under the will of the testator.

The devise was, as we have seen, to *the children* of Mourning Boone. Whom did the testator intend to include in this general designation? Certainly, those of the children who were then living, and not those who had previously died. The presumption that the testator intended to give any portion of his estate, to persons he knew were not then in existence, is altogether inadmissible. If the devise had been to the children by name, or to the *ten children* of Mrs. Boone, the issue of such as may have been dead, at the making of the will, would have taken under the statutes. And so, perhaps, if it had been shown that the will was made under the belief, on the part of the testator, that the children were all then living, the claim of the issue might have been sustained. On this point, however, we need not and do not express an opinion.

It has been repeatedly held that the word children does not ordinarily denote grand children, and is never so construed except in cases where it is indispensably necessary to effectuate the obvious intent of the testator. (*Churchill vs. Churchill, &c.*, (2 *Met. Ky. Rep.*, 466.) No such necessity exists in this case. ✓

The judgment is affirmed.

CASE 36—PETITION EQUITY—OCTOBER 3.

Allen vs. Brown.

APPEAL FROM THE NELSON CIRCUIT COURT.

1. It is error to render judgment sustaining an attachment against a non-resident defendant, not summoned, and who does not appear, without a warning order against him. (*Civil Code*, sec. 88.)

2. Where no attorney is appointed to defend for a non-resident defendant, not summoned and who does not appear, the judgment against him is erroneous. (*Civil Code*, sec. 440; 14 *B. Mon.*, 272.)

3. In an action against a non-resident defendant, not summoned and who does not appear, if the bond, required by section 440 of the *Civil Code*, is not executed, the judgment against him is erroneous. (14 *B. Mon.*, 272; 1 *Met.*, 649.)

4. The affidavit of the plaintiff to obtain an attachment must state that his claim is just. The omission of such statement is cause for reversal. (*Civil Code*, sec. 222; 17 *B. Mon.*, 542; 3 *Met.*, 281.) But, upon the return of the cause to the circuit court, the plaintiff may be allowed to amend his affidavit. (*Civil Code*, sec. 161.)

5. The prosecution of an appeal by a non-resident defendant, not summoned and who did not appear, is an appearance to the action. Upon a reversal and return of the cause, for failure to have a warning order, bond executed, or an attorney appointed, those steps will not be necessary, but the defendant may make defense by answer or demurrer. (1 *Met.*, 649.)

6. The act of March 15, 1862, (*Secs. Acts*, 92,) relates only to the "grounds of attachment," and authorizes the plaintiff to amend merely for the purpose of stating grounds which existed when the attachment was obtained, not set forth in the original affidavit, or new grounds arising subsequently. It does not authorize an amendment with reference to the nature, justness, or amount of the plaintiff's claim. But—

7. Section 161 of the *Civil Code* applies to proceedings by attachment on affidavit, and authorizes the amendment of a defective affidavit. There is no difference in principle between allowing the amendment of a petition on which an attachment issues, and the amendment of an affidavit on which an attachment issues. The ruling in *Pool vs. Webster, &c.*, (3 *Met.*, 282,) not adhered to. (3 *Met.*, 286; 18 *B. Mon.*, 230; 17 *Id.*, 324; 2 *Met.*, 138.)

8. An attachment, issued upon a defective affidavit, is not void; but is within the general rule that the proceedings of a court, having jurisdiction of the person or subject, are not void, however erroneous they may be. The ruling in *Pool vs. Webster*, (3 *Met.*, 281,) not adhered to.

WM. JOHNSON, for appellant, cited *Civil Code*, secs. 574 to 585; , secs. 440, 88; 14 *B. Mon.*, 270; *Miles vs. Watson*, *Miss. Opin.*, Sept., 1854; *Petit vs. Perry*, *Miss. Opin.*, Jan., 1855; *Bodley's heirs vs. Morris*, *Miss. Opin.*, Oct., 1857.

C. A. WICKLIFFE, on same side.

WM. R. GRIGSBY, for appellee.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

Brown attached property, alleged to belong to the appellant, Allen, and, from the judgment sustaining that attachment, Allen has appealed.

The judgment must be reversed for the following reasons:

1. There was no warning order against Allen, who was alleged to be a non-resident, and who was not summoned and did not appear. (*Code, sec. 88.*)

2. No attorney was appointed to defend for him. (*Sec. 440, 14 B. Mon., 272.*)

3. No bond was executed, as required by *section 440, (14 B. Mon., 272; 1 Met., 649.)*

4. The affidavit failed to state that the claim is just. (*Sec. 222; 17 B. Mon., 542; 3 Met., 281.*)

The appeal being an appearance to the action, it will not be necessary, on the return of the cause, to have a warning order made, a bond executed, or an attorney appointed, but the appellant will have a right to make defense by answer or demurrer. (*1 Met., 649.*)

It remains to be determined whether, on the return of the cause, the attachment should be vacated for the defect in the affidavit, or whether the appellee should have leave to amend the affidavit, by stating that the claim is just.

An act approved March 15, 1862, declares, "that in any proceeding by attachment now pending, or hereafter commenced, the affidavit or ground of attachment may be amended so as to embrace any grounds of attachment that may exist up to and until the final judgment upon the same. If the amendments embrace only grounds existing at the commencement of said proceeding, the lien created by the suing out or levying the original attachment shall be held good; but if the amendments embrace new grounds, not existing at the time of the suing out of the original attachment, the lien shall exist upon the property levied on from the filing of the same." (*Sess. Acts, 92.*)

Allen vs. Brown.

This act relates only to the "grounds of attachment," and authorizes the plaintiff to amend merely for the purpose of stating grounds which existed when the attachment was obtained, but not set forth in the original affidavit, or new grounds arising subsequently. It does not authorize an amendment with reference to the nature, justness, or amount of the plaintiff's claim. Whether or not the affidavit can be amended in these respects depends upon the construction to be given to certain provisions of the Civil Code.

By *section 161* it is provided that, "the court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

* * The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

It is clear that the plaintiff, in this case, may be allowed to amend on proper terms, if that section applies to *proceedings* by attachment on affidavit.

In *Pool vs. Webster, &c.*, (3 *Met. Ky. Rep.*, 282,) it was held to be inapplicable to such proceedings. In that case the affidavit was defective because the agent making it failed to state that the plaintiff was out of the county. The defect was of the same character as the defect here, and did not relate to the *grounds* of the attachment. It was held that *section 161* did not apply to the case, and that the court below erred in allowing an amendment of the affidavit. There, a motion was made to vacate the attachment before the affidavit was amended. Here, no such motion has been made. This distinction, however, is not material, because, if *section 161* applies to such affidavits, it authorizes an amendment of them "at any time, in furtherance of justice, and on such terms as may be proper," without regard to any motion to vacate; and, on the

other hand, if it was correctly assumed in the case referred to, that the section does not apply to such affidavits, and that an attachment issued upon a defective affidavit is void, and, therefore, incapable of being helped by amendment, none can, of course, be allowed, even if there is no motion to vacate.

All that was said in that case, on this subject, is, that *section 161* "relates altogether to amendments in the pleadings, and the character and form of the proceedings, and not to defects such as we are now considering, and which not only affect the substantial rights of the appellant, but render void the order of attachment complained of."

An attachment is a "special proceeding" as defined by the Code. (*Preliminary Provisions, secs. 2, 3 and 4.*) Section 161 applies to "*any proceeding*" under the Code, and necessarily applies, therefore, to proceedings by attachment. This was conceded in *Pool vs. Webster, &c.*, but the section was held to relate only to "the character and form" of the proceeding, and not to such defects as the court were then considering.

This conclusion we cannot adhere to. It is not sustained either by the letter or policy of the Code, nor by any satisfactory reasoning to be found in the opinion. The precise idea intended to be conveyed by the expression, "the character and form of the proceeding," is not distinctly perceived, nor do we perceive the ground of distinction between defects in "the character and form of the proceeding," and defects in the affidavit which constitutes a part of the proceeding. The language of the law makes no such distinction. It speaks of *proceedings* and not of their character and form, and it authorizes the amendment of "any pleading or proceeding" in certain respects or "in any other respect."

As the affidavit forms part of the proceeding, and as the section authorizes the amendment of any proceeding, "by correcting a mistake in the name of a party, or a mistake in any other respect," it is difficult to escape the conclusion that the section was intended to apply to a defective affidavit.

As already stated, the opinion under review concedes that section 161 authorizes amendments with respect to "the character and form" of such proceedings. Would not an attach-

ment, in a proceeding that does not conform to the Code, either in its character or form, be as invalid as an attachment issued upon a defective affidavit? And why should an amendment be allowed in the one case, any more than in the other?

To sustain an attachment a petition, stating a cause of action, is as necessary as an affidavit stating that the claim is just. If the petition may be amended, why may not the affidavit also, especially as both are clearly embraced in the terms of the law which gives the right to amend? The fact that this is a statutory proceeding, summary in its nature and sometimes oppressive in its operation; furnishes reasons for requiring strict conformity to the provisions which authorize it, but furnishes no reason for dispensing with those other provisions which authorize the amendment of any proceeding under the Code.

If, however, an attachment issued upon a defective affidavit is valid, as it was said to be in *Pool vs. Webster, &c.*, it could not be helped by an amendment under section 161, and such amendment, therefore, should not be allowed. But upon what ground can it be held void? The Code does not declare that the clerk's order of attachment shall be void unless the requisite affidavit is filed, nor that the jurisdiction of the court is to depend on the filing of such affidavit. The case seems to be within the general rule, that the proceedings of a court, having jurisdiction of the person or subject, are not void, however erroneous they may be. The jurisdiction of the court in attachment cases depends upon the actual or constructive service of process upon the defendant, and not upon the plaintiffs' affidavit, nor upon the clerk's order. And these views are, we think, sustained by several cases which were not noticed in *Pool vs. Webster, &c.* In one of these it was held that a petition might be amended in an attachment suit brought by a judgment creditor, under section 476 of the Code. (2 Met., 286.) In such cases the affidavit required by section 222 is dispensed with. The attachment issues upon the filing of the petition verified in the ordinary mode. But there is no difference in principle between allowing the amendment of a peti-

tion on which an attachment issues, and the amendment of an affidavit on which an attachment issues.

In another case it is said that, "the objection that the allegations of the petition are insufficient to uphold the attachment is also well founded. Their purport is, that Clarke was insolvent, and Smith was preparing to remove from the State with the intention of not returning. The charge of insolvency alone is insufficient for an attachment; a charge of removing from the State, unaccompanied with the statement that the party was about to remove his property, or a material part thereof, not leaving enough to satisfy the demand sued for, is equally defective. In this case, however, there was no answer, and no motion to vacate the attachment, and, upon the return of the cause, the appellee should have leave to amend his petition if he so desires, and, upon his failure to do this, his attachment should be vacated." *Gossom vs. Donaldson*, 18 B. Mon., 230.) Though the Code requires the plaintiff to file an affidavit, stating the grounds for an attachment, as well as the nature, justness, and amount of his claim, yet if the petition itself contains a statement of all these matters, and is sworn to, it should be regarded as supplying the place of a separate affidavit, which, under such circumstances, may be dispensed with altogether. (*Scott vs. Doneghy*, 17 B. Mon., 324.) The case of *Gossom vs. Donaldson*, therefore, is an authority, that the plaintiff, where no motion has been made to vacate the attachment, may amend his affidavit by stating a ground for an attachment, and thus cure a defect, which, according to *Pool vs. Webster, &c.*, renders void the order of attachment. In the case under consideration, no motion has been made to vacate the attachment, and, in allowing an amendment to the affidavit, we do not go as far, perhaps, as the court went in *Gossom vs. Donaldson*, because here the affidavit states a valid ground of attachment, and is defective only because it fails to state the justness of the claim.

In *Ryan vs. Bean's adm'r.*, (2 Met., 138,) that part of section 161 which prohibits the reversal of a judgment for any error or defect in the proceedings, which does not affect the substantial rights of the adverse party, was held to be applicable to de-

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fective affidavits in attachment cases. If so, the preceding part of the same section is clearly applicable, and authorizes the amendment.

Our conclusion, then, is, that the court below may, on the return of the cause, allow the appellee to amend his affidavit on such terms as may be proper.

Concerning the alleged indebtedness of the appellant, Allen, we need not express an opinion.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CASE 37—PETITION EQUITY—OCTOBER 3.

Phillips vs. Clark, &c.

APPEAL FROM THE MARION CIRCUIT COURT.

1. A deed, though acknowledged and left in the clerk's office for registration, is not constructive notice to creditors and purchasers, until the tax be paid thereon. (*Rev. Stat.*, chap. 24, sec. 32.) As to them, the vendee has but an equitable title.

2. If a man is silent when he ought to speak, equity will debar him from speaking when conscience requires him to be silent. (*Roberts on Fraud. Con.*, 527-8.)

3. A deed was acknowledged and left for registration, but the tax not paid on it; the vender, who is insolvent, remained in possession of the lot conveyed, and contracted with a mechanic to build a house upon it. While the building was progressing, the vendees, aware of it, stand by, see it go up, remain passive and silent—the mechanic not having had any notice of their claim. *Held*, (in a suit to enforce the mechanic's lien,) that the property is subject thereto.

SHUCK & WOODS, for appellant, cited *Rev. Statutes*, chap. 24, sec. 32; *Ib.*, chap. 80, secs 20, 21, 22; 3' *Stat. Law*, 409; 6 *B. Mon.*, 29; 11 *Ala.*, 386.

ROUNTREE & FOGLE, for appellees, cited 15 *B. Mon.*, 82; *Bowman vs. Phillips, &c.*, *Mss. Opin.*, June, 1857.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

On the 11th of January, 1860, Abell and Winsatt, sold and conveyed to appellee, T. J. Clark, a certain lot in the town of Lebanon, at the price of \$450, no part of which was paid down, and a lien was retained in the deed for the purchase money.

The deed was acknowledged by Abell on the 11th, and by Winsatt on the 12th of January, 1860, before the clerk of the Marion county court, and ordered to be recorded, but was not recorded until the 9th of April, 1861.

On the 5th of March, 1860, Clark and wife sold and conveyed the same lot to D. W. Phillips for \$450—\$150 of which were paid down, and the balance was to be paid on a future day. This deed was acknowledged by Clark, before the proper officer on the day it bears date, and by Mrs. Clark, on the 7th of May, 1860, and ordered to be recorded.

On the 7th of May, 1860, D. W. Phillips, in consideration of four hundred and fifty dollars, expressed to have been paid in hand at the time, sold and conveyed the same lot to B. J. Beaven and Elias Russell. This deed was acknowledged before the proper officer the day it bears date; and all of said deeds were left in the office for registration.

In the latter part of May, 1860, and subsequent to the several conveyances referred to, Clark, who continued in the possession of the lot from the time of his purchase from Winsatt and Abell, and was at that time in possession, contracted with R. M. Knott, a carpenter, to construct a building on said lot. Knott immediately commenced the building, which he completed in August, 1860, and on the 1st of September, thereafter, settled with Clark therefor, when Clark was found indebted to him in the sum of \$280, and for which he executed his note payable two months from date.

On the 9th of April, 1861, Knott and J. G. Phillips, to whom it is alleged Knott had assigned Clark's note, brought a suit in equity against Clark and wife, Winsatt and Abell, D. W. Phillips, Elias Russell and Benedict J. Beaven to coerce the collection of the balance due on said note, by a sale of the house

and lots, \$62 50 having been paid by Clark on the 4th of March, 1861, alleging in their petition the foregoing facts, and in addition thereto they allege that Beaven and Russell purchased the lot from D. W. Phillips for Clark, who, in fact, advanced the means to pay for it, and procured the deed to be made to Beaven and Russell by Phillips to cover and protect it from the creditors of Clark, and that they hold it in secret trust for his use and benefit. That the lot is situated in the most business part of the town of Lebanon, opposite the court house; that Beaven and Russell resided, in 1860, in the county of Marion, were frequently during that year in Lebanon; that they never had the lot in possession, and never exercised any control over it; that they were in Lebanon repeatedly while the building was in progress, knew Knott was constructing it on the lot; that they never informed him of their claim, made no objection to the erection of the house, and had no interview with him whatever; that Knott and his assignee were wholly ignorant that they had any claim upon the lot, had no notice of it, and had never heard of their claim until a few days before the institution of this suit; that the deed from D. W. Phillips to them was invalid and could not operate as constructive notice to them of the claim of Beaven and Russell, because, although it had been acknowledged and lodged with the clerk of Marion county, the tax had not been paid on it.

That, by law, a lien existed on the property in favor of Knott, the mechanic, who constructed said house, for the amount due and unpaid on said note, which lien they pray may be enforced for all proper relief.

During the progress of the suit, Knott died, and it was prosecuted afterwards by Phillips alone.

The defendants do not, in their answers, controvert the allegations that Knott was the mechanic who erected the house under a contract with Clark, the location of the lot, and that Clark was in possession and managed and controlled it; but they allege that the purchase was made for the benefit of Mrs. Clark; that Russell, who is her father, had \$150 of her funds in his hands; he advanced to her \$150, and Beaven, being her uncle, also advanced \$150 for her in payment for the lot, and

they took the conveyance to themselves in trust for Mrs. Clark, and to enable Beaven to collect the \$150 advanced by him. Nor do they controvert the charge that the tax on the deed from Clark to Phillips, and from him to Beaven and Russell were not paid when the suit was commenced.

It is unnecessary to give further attention to the pleadings. Upon the hearing the court below rendered a personal judgment against T. J. Clark for the amount due and unpaid on the note, refused all other relief and dismissed the petition as to the other defendants, from which judgment J. G. Phillips has appealed.

By an act of the Legislature approved 10th of March, 1856, (*Session Acts*, 1855-6, p. 147, 2 vol.) it is provided that an act for the benefit of the mechanics of the city of Louisville, approved December 22, 1831, and also sec. 7 of an act for the benefit of the mechanics of Louisville, approved December 22, 1831, (1834 it should be,) are made to apply "to the town of Lebanon and county of Marion."

By the 1st section of the act of 1831, *supra*, a lien is secured to mechanics lumber merchants, and all others performing labor, or furnishing materials for the construction or repair of any building within the city, on the building constructed or repaired, or for which materials have been furnished, to the extent of labor done or materials furnished, (3 vol. *Stat. Law*, 409.)

By the 7th section of the Act of 1834, *supra*, the 1st section of the Act of 1831, was so amended as to extend the liens thereby granted to the interest of the employer in the lot and premises on which a building may be constructed or repaired, provided that said section shall not be construed to affect, impair, or injure any lien, or liens, whether by mortgage, deed of trust or otherwise, which any person or persons, bodies politic or corporate, may have on said property. (3 vol. *Stat. Law*, 411.)

To the extent of Clark's interest in the property, (if he had any) Knott acquired a lien on it, for the amount due him; and the question arises, will Beaven and Russell be permitted to intervene their claim to defeat Knott and his assignee?

Section 32, chap. 24, p. 284. (1 vol. *Rev. Stat.*, provides that no deed shall be held to be legally lodged for record until the tax be paid thereon. The tax on the deeds from Clark and wife to Phillips, and from him to Beaven and Russell, were not paid until after the building was completed by Knott. These deeds, in consequence of the enactment *supra*, do not furnish any evidence of constructive notice to him of the claim of Beaven and Russell; they only had, as to creditors and purchasers, an equitable title to the lot, and there is no evidence that Knott had actual notice of their claim.

He found Clark in the actual possession of the lot, managing and controlling it as he pleased, without a house upon it. The lot yielded but little if any income in that condition. By the labor of Knott, the annual profits are greatly increased, producing a rent for the first year after the house was completed of \$200. While this work, so important to the parties, and adding so much to the value of the lot was progressing, Beavens and Russell stand by and see it go up from the foundation to the finishing, remain passive and silent during the whole time, and never speak until the mechanic asked to be remunerated for his labor; they then come forward and say they hold the legal title to the lot, holding it however in trust for a married woman, and resist the payment of the claim because the improvement was not made by virtue of any contract or agreement with them or with any one who had any authority from them to make such contract. When they should have spoken they are silent, and when they should be silent they speak. But the equitable and well established rule in such cases is, if a man is silent when he ought to speak, equity will debar him from speaking when conscience requires him to be silent. (*Roberts on Fraud. Con.*, 527-8, &c.)

Clark is insolvent, and to permit Beaven and Russell, under the circumstances disclosed in this record, to enjoy the fruits of Knott's labor, while he goes unremunerated, would be a fraud upon his rights.

There is no evidence, as against appellant, that any trust exists for the benefit of Mrs. Clark; and no sufficient reason is

Lewis, &c. vs. Harris, &c.

shown to protect the property from being subjected to the payment of appellant's claim

Wherefore, the judgment is *reversed* and the cause remanded for further proceedings consistent with this opinion.

CASE 38—PETITION EQUITY—OCTOBER 5.

Lewis, &c. vs. Harris, &c.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

1. A person is not liable upon a contract which he makes as the agent or trustee of another, with authority to do so.

2. A note signed "John B. Lewis, trustee for Ann R. Talbott," and containing the same recital in the body of the instrument, purports *prima facie* to have been executed by him as trustee.

3. The question concerning the intention with which a party executed a note—whether to bind himself or as trustee for another—is a question of law, to be decided by the court, in view of the language of the note, the circumstances under which it was executed, and the situation of the parties. An allegation concerning the intention is an allegation of a legal implication, and no denial is necessary.

4. The statute which prohibits married women from directly or indirectly creating any charge or incumbrance upon their separate estates, does not affect the rights and powers of their trustees with reference to such estates. It speaks only of alienations by married women.

5. Before the statute the trustee of a separate estate could not sell it except upon an express power of sale, nor could he create any charge upon it except for purposes authorized by the creator of the trust or approved by courts of equity. These rights and powers are not affected by the statute *supra*.

6. It is equitable that trust property, conveyed to the trustee for the separate use of a married woman, and for which he executed his notes as trustee, should be subjected for the purchase money. Had he paid the debt with his own money he would have held an equitable lien for his reimbursement. By the execution of the note he substitutes the creditor to this equitable lien, and thus creates a charge upon the property for the payment of the debt.

JEFF. BROWN, for appellants, cited 1 *Met.*, 71; 2 *Kent's Com.*, 824; 17 *B. Mon.*, 492.

E. D. STONE, for appellees, cited *Story on Promissory Notes*

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secs. 64, 65; *Story on Bills of Exchange*, secs. 74, 75; 5 *Mar.*, 299; 6 *lb.*, 58; 8 *Cowen*, 31; 2 *Brod. & Bing.*, 460.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

In the year 1859 the appellees conveyed the lease and furniture of a hotel to the appellant, Lewis, in trust for the separate use of Ann R., wife of John H. Talbott, in consideration of \$1,874.57, of which \$1,000 was paid with money derived by Mrs. Talbott from her mother's estate, and for the residue of which Lewis, trustee, gave two notes. One of the notes was paid, and part of the other; how or by whom, does not appear. For the unpaid residue a new note was given, which we copy:

"\$379.20.

LOUISVILLE, KY., July 1, 1860.

Four months after date, we, John B. Lewis, trustee for Ann R. Talbott, and Ann R. Talbott, John H. Talbott, and W. H. Middleton, jointly and severally promise to pay to the order of L. W. Harris & Co., three hundred and seventy-nine $\frac{2}{10}$ dollars, negotiable and payable at the Bank of Kentucky, with interest from date, for value received.

Given under our hands this day and date as above.

JOHN B. LEWIS,

Trustee for Ann R. Talbott,

ANN R. TALBOTT,

JOHN H. TALBOTT.

WM. H. MIDDLETON, (Security.)"

The appellees sued the makers of said note, alleging the facts above mentioned, and praying for a judgment for their debt and all proper relief.

The chancellor dismissed the petition as to the trust-property, and rendered a judgment against Lewis, Middleton, and John H. Talbott, from which they appeal.

The only question that we need to discuss is, whether or not Lewis is individually liable upon the note.

We need not cite authorities to prove that a person is not liable upon a contract which he makes, as the agent or trustee of another, with authority to do so.

It is clear, also, that the note sued upon purports, *prima facie*,

to have been executed by Lewis as the trustee of Mrs. Talbott. The appellees, however, rely upon two facts as showing that he meant to bind himself, and not merely the trust estate:

1. The first fact is, that Lewis failed to deny the allegation, that the "defendants, John B. Lewis and Ann R. Talbott, signed said note with the intention of binding both of said defendants, and subjecting said trust property to the payment of said note." The failure to deny this allegation, it is contended, is an admission that Lewis intended to become individually bound.

But it is not distinctly alleged that he meant to bind himself individually; and we doubt whether the sentence above quoted, if it stood alone, should be regarded as alleging more than that he meant to bind the trust estate and himself, as trustee. That doubt is increased by the fact, that the next sentence of the petition alleges that said defendants "signed said note with the intention of binding the separate estate of said A. R. Talbott." If Lewis signed the note for that purpose, of course he did not intend to bind himself individually.

Moreover, the question concerning his intention is a question of law, to be decided by the court, in view of the language of the note, the circumstances under which it was executed, and the situation of the parties. The allegation, therefore, concerning the intention with which he signed the note, is an allegation of a legal implication, and no denial was necessary.

2. It is contended, that, as was held by the chancellor, according to the Revised Statutes, a separate estate of the wife cannot be incumbered except by the order of a court of equity;" that Lewis must be presumed to have known that such was the law; and, therefore, it must be presumed that he intended to bind himself.

The chancellor's conclusion is probably right, if he correctly assumed that the Revised Statutes prohibit the trustee of a separate estate from creating any charge upon it. But, in our opinion, that assumption is not correct.

The statute is as follows: "If real or personal estate be

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hereafter conveyed or devised for the separate use of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may thereafter have, she shall not alienate such estate with or without the consent of any husband she may have; but may do so, when it is a gift, with the consent of the donor or his personal representative." (*Revised Statutes, chap. 47, art. 4, sec. 17.*)

The statute applies to indirect as well as direct alienations, and, consequently, prohibits married women from creating any charge or incumbrance upon their separate estates. (*Stacker vs. Whillock, 3 Met., 244; Hanly & Co. vs. Downing, et al, decided in December, 1862.*) But it speaks only of alienations by married women. We perceive no principle of construction which authorizes us to apply it to alienations by their trustees, nor any reason for attempting thus to strain its language.

Before the statute, married women were treated in equity as unmarried women with reference to their separate property. A married woman could sell her equitable title, or charge it for her debts, according to her discretion, unless expressly restrained by the instrument creating the estate. Apparently, the chief object of the statute is, to destroy those powers formerly possessed by married women, and thus prevent them from making improvident dispositions of their separate estates, under the influence of their husbands. To accomplish that object it was not necessary to prohibit alienations by their trustees, because, first, the husband's influence does not extend to the trustee; and, secondly, before the statute, the trustee of a separate estate could not sell it except under an express power of sale, nor could he create any charge upon it except for purposes authorized by the creator of the trust, or approved by courts of equity.

It has been decided that the statute prohibits a married woman from selling her separate property, purchased and held by her under a conveyance, which declared that she might sell and convey the property as if she were an unmarried woman. (*Stewart, &c. vs. Wilder, 17 B. Mon., 55.*) According to that decision, the statute, if it applies to alienations by trustees, prohibits the sale by a trustee of a separate estate, even under

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an express power of sale. It seems clear that this was not the object of the legislature.

Our conclusion is, that the rights and powers of trustees, with reference to such estates, are not affected by the statute.

It is equitable that the trust-property conveyed to Lewis, shall be subjected for the purchase money. If he had paid the note sued upon with his own money, he would have held an equitable lien on the property for his reimbursement. (*Hill on Trustees*, 572.) He had the power to substitute the appellees to the equitable lien which he would have acquired by advancing the purchase money, and thus to create a charge upon the property for the payment of the note. And it is clear that he intended to do so, and not to bind himself individually.

The other grounds of defense are not sustained by the evidence.

The judgment against Lewis, and dismissing the petition as to the trust-property, is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

CASE 39—PETITION EQUITY—OCTOBER 5.**Johnson's Executor vs. Wiseman's Executor.****APPEAL FROM THE FAYETTE CIRCUIT COURT.**

1. See the opinion in this case for a discussion of the question as to the rights to what are called fixtures; (1,) as between heir and executor; (2,) between the executor of a tenant for life and the remainder man or reversioner; (3,) between landlord and tenant; (4,) in respect to fixtures erected for the purposes of trade; (5,) between vendor and vendee, mortgagor and mortgagees.

2. Upon the sale of the freehold, fixtures will pass in the absence of any express provision to the contrary.

3. What will give chattles the character of fixtures and deprive them of that of personality? See opinion for a review of the authorities on this subject.

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4. In this case chandeliers or gas burners in a house are held to be fixtures.

PAYNES, for appellant, cited 14 *Mass.*, 352; 2 *Smith's Leading Cases*, 208; 1 *Parson's on Contracts*, 431; 1 *Duer*, 363; *Ames on Fixtures*, 79; 18 *Eng. Law and Eq. Rep.*, 147.

BUCKNER & DUDLEY, for appellee, cited 12 *Ad. & E.*, 57, 58; *Shepherd's Touchstone*, 89; *Hobart*, 234; *Vaughn. Rep.*, 109; 1 *Parsons on Contracts*, 431; 4 *M. & W.*, 409; 2 *B. & A.*, 167; 1 *Sugden on Vendors, and notes*, page 60, 61.

JUDGE PETERS DELIVERED THE OPINION OF THE COURT:

T. A. Marshall sold and conveyed to C. M. Johnson a house and lot in the city of Lexington, and retained a lien on the property to secure the unpaid purchase money.

Johnson afterwards mortgaged the same property, with the household goods and kitchen furniture in the house, to R. A. Buckner, to secure a debt which he owed him.

The debt to Marshall was not paid when it matured, and he brought his suit against Charles F. Johnson, the executor of C. M. Johnson, who had in the meantime died, to coerce the collection of his debt by the enforcement of his lien, and made R. A. Buckner, the mortgagee, a defendant.

Buckner answered, admitting the prior and superior lien of Marshall, made his answer a cross-petition against his co-defendant, C. M. Johnson's executor, and prayed for a foreclosure of his mortgage, and for a sale of so much of the mortgaged effects as would be required to pay his debt.

It seems that a judgment was rendered in the case in favor of Marshall, subjecting the property to sale to pay his debt, and appointing a commissioner to make the sale; but the judgment is not copied in the record furnished us.

The commissioner reported that on the 6th of August, 1862, he "offered said property, in the decree mentioned," for sale, and Richard A. Buckner became the purchaser at the price of \$6,750.

Afterwards a commissioner was, by an order of the court in some consolidated cases, (the names of the parties to which are not given,) directed to sell the furniture, &c., which order he proceeded to execute on the 22d of Nov., 1862; and, after

naming in his report the articles he sold, &c., states that the chandeliers, or gas fixtures, in the house previously sold, were claimed by R. A. Buckner as fixtures of, and belonging to, the house, and the sale thereof was not made on account of that claim; and the question as to whether said chandeliers, &c., passed by the sale of the house, &c., to Buckner was thereupon submitted to the circuit judge, who decided favorably to Buckner, and Johnson's representatives have appealed.

These chandeliers were purchased and put into the house by Johnson after his purchase from Marshall; but whether before or after the mortgage to Buckner does not appear. They are affixed, by means of screws, to iron pipes let into the walls of the house for the purpose of conducting gas to the burners, and can be removed without injury to the walls or ceiling of the house, or to the pipes to which they are attached; and, whilst they are used as burners to light up the house, their finish and construction are such as to render them ornamental also. The iron pipes cannot be taken out without removing a part of the walls through which they pass.

Articles of a personal nature, affixed to the freehold, are generally denominated fixtures. It will, therefore, be necessary to inquire what kind of annexion confers upon goods the character of fixtures.

Questions respecting the right to what are called fixtures arise between three classes of persons: 1. Between heir and executor; and there the rule obtains with most rigor in favor of the inheritance, and against the right to consider, as a personal chattel, anything which has been affixed to the freehold. 2. Between the executor of a tenant for life and the remainder man or reversioner; and here the right to fixtures is considered more favorably for the executor. 3. Between landlord and tenant; and here the claim to have articles considered as personal property, is received with the greatest latitude and indulgence. 4. There is still an exception of a broader character in respect to fixtures erected for the purposes of trade.

The strict rule as to fixtures, that applies between heir and executor, applies equally between vendor and vendee and mortgagor and mortgagee. (2 vol. *Kent's Com.*, page 411, 12

and 413.) There can be no doubt that, upon the sale of the freehold, fixtures will pass, in the absence of any express provision to the contrary. It has been held in some cases that to give chattles the character of fixtures, and deprive them of that of personalty, they must be so firmly fixed to the realty that they cannot be removed without injury to the freehold from the act of removal, and apart from the subtraction of the thing removed; but, the better opinion is, however, the other way, and in favor of viewing every thing as a fixture which has been attached to the realty with a view to the purposes for which it is held or employed, however slight or temporary the connection between them. It has accordingly been decided, in a great number of cases, that the machinery of a manufactory is to be regarded as a part of the realty, whether it be attached to the body of the building, or merely connected with the other machinery by running bands or gearing which may be thrown off at pleasure and without injury to the freehold. (*Notes to Elwes vs. Mawe, and authorities cited, 2 vol. Smith's Lead. Cases, 249.*)

Nor can it be said that actual annexation was so essentially necessary to constitute a fixture, even in the earliest and most technical periods of the common law, as to bear down and overpower all other considerations. The doctrine of heir-looms necessarily implies that chattles may be deprived of their moveable and personal character, and rendered inseparably attendant upon the inheritance, by the force of moral association. It has never been doubted that the keys of a house, or the fences or walls of a farm, are part of the freehold. It was held in *Kittridge vs. Wood*, (3 *New Hamp.*, 503,) and *Parsons vs. Camp*, (11 *Conn.*, 525,) that the manure on a farm at the time it was sold vested in the vendee. And these decisions were followed in *Goodrich vs. Jones*, (2 *Hill*, 142,) and the purchaser held to be both entitled to the manure and the fences, although the latter had been detached from the soil. (*Ib.*, p. 251-2.)

These authorities are cited to show that the ancient rule, which treated nothing as fixtures except such chattles as were fastened to the realty and were more or less immovable, has

been modified and moulded to suit the improvements in arts and science of modern times.

In *Fairis vs. Walker*, (1 *Bail.*, 540,) the plaintiff sold and conveyed his plantation to the defendant, on which cotton was grown, and a cotton gin was in a gin house on the premises attached to the gears. The plaintiff brought trover for the gin; but the court held that it was a fixture, and passed with the freehold; saying, as between heir and executor, or vendor and vendee, all things which are necessary to the full and free enjoyment of the freehold, and in any way attached to it, are held to be fixtures, and pass with it.

In 6 *Greenleaf*, 157, JUSTICE WESTON said: "Modern times have been fruitful of inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venitian blinds, which admit the air and exclude the sun whenever it is desirable so to do, are of modern use; so are lightning rods, which have become common in this country and in Europe. These might be removed from the building without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by a deed as appertaining to the realty. In *Walker vs. Shannon*, (20 *Wend.*, 636,) JUSTICE COWEN, with great labor, reviewed the authorities on this point, and came to the conclusion that the machinery in a woolen factory, being moveable, and not in any manner affixed or fastened to the building or land, although material to the performance of the factory in certain parts of its work, was personal property, as between tenants in common and owners of the fee. The question was decided as if it had arisen between vendor and vendee. But in *Voorhis vs. Freeman*, (2 *Watts & Serg.*, 117,) the case of *Walker vs. Shannon*, *supra*, was referred to and disapproved.

The question whether chattles are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which they are used. (2 *Smith's Lead. Cases*, 251.)

In *Lawrence vs. Kemp*, (1 *Duer*, 363,) the question was be-

tween a landlord and his tenant. A former tenant had put up some gas fixtures and screwed 70 stools to the floor of the demised building, which he had used as a store room, and failed to remove them during his term. After the building had been demised to another tenant, and while he was in possession, the former tenant entered and removed the gas fixtures and stools which he had put in the building, and the landlord brought suit against his tenant in possession for the value of these articles, alleging that he had agreed to deliver the store room with the fixtures therein on a named day. The court held that such articles, when placed by a tenant in a demised building during his term, are his property. If not removed by him during the term, they do not, for that reason, cease to be his property, and he may remove them after his term expires without subjecting himself to any damages for such removal, even though he be liable to an action of trespass for an entry on the demised premises.

The rule which governed this case is, that the claim to have such articles considered as personal property is received with the greatest latitude and indulgence; a very different rule from that which prevails between vendor and vendee, as we have before shown, and the difference in the rules governing destroys the analogy in the two cases.

We have shown, authoritatively, as we think, that the physical annexation of the articles in controversy to the freehold is such as, between vendor and vendee in an ordinary sale without an express reservation of them, would pass them to the vendee. But, in this case, the articles never belonged to Marshall; they were purchased and put up by Johnson after he purchased the house and lot; and the question is, if Marshall had no lien on them, can Buckner, a purchaser under his sale, to enforce his lien, be permitted to hold them?

The sale of the property was doubtless advertised. Buckner, and others desiring to purchase, attended at the time and place. They found these articles in their appropriate places, to be used for the purposes for which they were designed. The representatives of Johnson had not removed them, probably because they regarded them as a part of the freehold.

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There is no proof that Buckner knew that Johnson had placed them there after his purchase. No claim was made to them by Johnson's representatives or those interested in the property, and no objection made to the sale. Purchasers and strangers, seeing them in their appropriate places, and no objections made to the sale, would regard them as a part of the freehold, and would bid for the property with the belief that the acquisition of it would confer upon them the right to these articles, which, from their nature and position, seemed to be incident to and a part thereof, and thereby be induced to bid more than they would otherwise have done.

Buckner, having purchased in good faith and for a valuable consideration, should take the property with the incidents, and in the condition it was in when he purchased.

Wherefore, the judgment is *affirmed*.

CASE 40—PETITION EQUITY—OCTOBER 7.

Jameson vs. Gregory's Ex'r.

Gregory, &c. vs. Jameson.

APPEALS FROM THE KENTON CIRCUIT COURT.

1. An agreement to pay for lottery tickets delivered to a party by the managers of a lottery, or return them not sold, made in Delaware, and not prohibited by the laws of that State, and containing no stipulation to do any act in violation of the laws of any other State, is valid; and notes and mortgages executed by such party, in consideration thereof, is enforceable here, although such party may have violated the laws of another State in his disposition of the tickets.

2. In contracts, called "contracts of sale or return," the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed time or in a reasonable time; and, if he fails to exercise this option by so returning them, the sale becomes absolute and the price may be recovered, in an action for goods sold and delivered. (3 *Eng. Law and Eq. Rep.*, 311; 3 *Duer*, 336; 14 *Johnson*, 167.)

3. A mere sale in one State or country, made with knowledge that the vendee in-

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tended to use the property to violate some positive law of another State or country, may be the foundation of an action, even in the State or country where law was intended to be violated. (3 *Met. Mass.*, 207; *Cowper*, 391; 1 *Curtis*, 244.)

4. Where lottery tickets are obtained by a party living in one State, upon an order sent to the vendors in another, the contract must be regarded as having been made in the latter State, and its legality tested by the laws in force there. (3 *Met. Mass.*, 207.)

KINKEAD & CARLASLE, and MENZIES & PRYOR, for Jameson, cited *Constitution of Ohio*, art. 5, sec. 6; *Swan's Statute*, (*Ohio*), 290, 292; *Story on Agency*, secs. 235, 344; *Story on Conflict of Laws*, secs. 246, 248; 3 *Barn. & Cres.*, 689; 2 *Wilson*, 133; 4 *Barn. & Cres.*, 312; 1 *H. Blackstone*, 322; *Smith on Mercantile Law*, 54, 55; *Story on Agency*, secs. 195, 330; *Livermore on Agency*, chap. 1, pages 19, 20; *Paley on Agency*, 8, 20, 74, 75; 3 *Chitty on Com. and Man.*, 222, 223; 1 *John. Cases*, 436; 5 *John.*, 326; 4 *Ib.*, 425; 14 *Ib.*, 146; *Story on Agency*, secs. 235, note 2, 268, 347; 11 *Wheat.*, 258; 6 *T. R.*, 61; 2 *Bos. & Pul.*, 371; 3 *Barn. & Adol.*, 179; 5 *Ib.*, 335; 14 *Vesey*, 191; 2 *Caines*, 146, and note; 7 *T. R.*, 630; 3 *Vesey* 373; 1 *Bos. & Pul.*, 296; 3 *East* 222; *Story on Conflict of Laws*, sec. 347; 2 *Sand. Sup. Ct. R.*, 146; 2 *Wilson*, 347; 3 *Bibb*, 500; 4 *Dana*, 381; 8 *Dana*, 91; 3 *Taunt.*, 226; 8 *T. R.*, 411; 6 *N. Hamp.*, 225; 2 *Watts & Serg.*, 235.

STEVENSON & MYERS, for Gregory, &c., cited 7 *J. J. Mar.*, 28; 4 *Bur.*, 2069; 1 *Bos. & Pullen*, 2; *Cowper*, 341; 2 *Crompton*, *Meeson & Roscoe*, 311; 5 *Taunton*, 181; 5 *Seldon*, 61; 3 *Met., Mass.*, 207; 11 *Wheat.* 258; 7 *B. Mon.*, 329; *Story's Agency*, secs. 196, 347, 217; 5 *Seldon*, 61 to 69; 2 *Mar.*, 137; 3 *Mon.*, 410.

CHIEF JUSTICE DUVALL DELIVERED THE OPINION OF THE COURT:

On the 12th of December, 1853, A. H. Jameson executed a mortgage to Walter Gregory, to secure the payment of thirty-three notes of that date, thirty-two of which were for \$200 each, and the remaining one for \$100, amounting in the aggregate to \$6,500.

On the 2d of April, 1855, Jameson executed a mortgage to Gregory and Maury to secure the payment of four notes of that date, amounting in the aggregate to \$4,450.

And on the 11th of February, 1856, he executed another

mortgage to Gregory and Maury to secure a note for \$4,946 50 of that date.

Gregory having died, his executrix brought suit to foreclose the first mentioned mortgage, seven of the thirty-two notes for \$200 each having been previously paid. The executrix, in conjunction with Maury, also brought two other suits to foreclose the other two mortgages. These three suits, together with several others, were afterwards consolidated and tried together.

The matters of defense relied upon by Jameson, in his several answers, were, in substance, that the notes and mortgages set up by the plaintiff "were given in consideration of lottery tickets sold in the State of Ohio by the defendant, as the agent of Gregory and Maury, and for no other consideration whatever. The said selling of tickets was done through the defendants' agents in Cincinnati, who failed to pay him the proceeds of the sales, and the defendant, considering himself bound for the conduct of his said agents, executed said notes and mortgages to secure the amount of their defalcations; and the defendant avers that by the laws of Ohio at the time said tickets were sold, and ever since, a penalty was and is denounced against any person who should or may sell, or in any manner deal in lottery tickets, and no contract or promise based upon any dealing in lottery tickets, could or can be enforced," and he therefore asks to have the notes and mortgages cancelled and surrendered.

The court below sustained the defense as to the notes and mortgages executed to Gregory and Maury, on the ground that a sale of the lottery tickets in Ohio by Jameson, as the agent of Gregory and Maury, and with their approval, was a violation of the statutes of Ohio, which prohibit the sale of such tickets within the State; that as both parties to the transaction were equally guilty of violating this law, neither could be held entitled to relief; and the notes and mortgages were declared cancelled. From this part of the judgment Gregory & Maury have appealed. The notes and mortgage to Gregory were sustained on the ground that the consideration on which they were given consisted of money loaned by Gregory to Jame-

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son, and of the purchase money due by the latter to the former for real estate, and judgment for the amount of the notes and for a foreclosure of the mortgage was rendered by the court. From that judgment Jameson has appealed. Both appeals will be considered together.

By the statutes of Ohio, a penalty of \$500 is imposed upon any person who may set up a lottery within the State, and a penalty of \$200 upon any person who shall sell lottery tickets, or shall act as agent for any lottery. (*Swan's Rev. Statutes of Ohio*, page 290.)

These statutes, enacted in pursuance of a constitutional provision, which, in substance, declares that "lotteries and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State," must be regarded as prohibiting, by implication, if not expressly, the sale of lottery tickets in Ohio. And, according to the well settled rule, no contract founded on acts of the parties in violation of such laws would be enforceable; certainly not in the courts of the State whose laws and policy were thus violated. How far comity would require the application of the rule to cases where the contract is made, and is to be performed, and is sought to be enforced in one State, the consideration of such contract arising out of acts of the parties in contravention of the statutes of another State, is a question which it becomes unnecessary to decide.

The first and most important question to be considered is, whether the evidence establishes the material grounds of defense relied on by Jameson. Has he shown satisfactorily that the notes and mortgages, or either of them, were given "in consideration of lottery tickets sold in the State of Ohio, by the defendant, as the agent of Gregory & Maury?" The answer to this question depends, of course, on the evidence, and particularly on the deposition of Jameson himself, taken in another case, but, by agreement, was read as evidence in this case.

It appears from that deposition, that the firm composed of Gregory and Maury and three other persons, were the managers of the Kentucky and Delaware State lotteries, at Wil-

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mington, Delaware. That, on the first of January, 1852, this firm and Jameson entered into an agreement by which he became their *agent* for the sale of tickets in those lotteries. The tickets were sent to him by the firm upon his order. He was, by the terms of the contract, charged with all the tickets he received, having the right to return and receive credit for such as he did not sell. He had the right to employ agents of his own, and to remove them at pleasure, these agents being responsible to him, and not to the firm. He was to pay over monthly the proceeds of all sales, to Gregory, who resided in Cincinnati, and who accounted to the firm for the amount. The agents employed by Jameson had their places of business, and made sales of the tickets in Cincinnati. They became indebted to Jameson in large sums, for the proceeds of their sales, and executed their notes to Jameson for the amount of such indebtedness. In consequence of their default Jameson became unable to meet his engagements with Gregory & Maury; and the notes and mortgages executed in April, 1855, and in February, 1856, were given to secure the balances due by him to them at those dates, on account of lottery tickets received and sold by him, and not accounted for. He states repeatedly that the consideration of those notes and mortgages was his indebtedness to the firm for lottery tickets, and that such indebtedness was caused by the indebtedness of his agents to him.

It is clear, we think, in view of these facts, that Jameson was not the mere factor or agent of Gregory & Maury. in the sale of these tickets. The tickets were delivered to him upon his promise to return, or pay for them at a fixed price. The agreement imposed no terms upon him with reference to the disposition to be made of them when received. He had a perfect right to sell them wherever he chose, and for cash or on credit, at his own unrestricted discretion. He might have sold them either by himself or by his agents. He adopted the latter mode, selecting his own agents and discharging them at his own option. These agents were responsible to him, and not to the firm at Wilmington. His liability to the firm was in no degree dependent upon the conduct of his agents or

upon the amount of their liability to him. He proves, on the contrary, that the indebtedness of his agents to him greatly exceeded his indebtedness to the firm, showing conclusively that his liability was, in no sense, to be measured by the liability of his agents to him. For the balances due him from time to time, he took the notes of his agents, payable to himself, treating them as his own property, and yet holding them as such.

The necessary legal deduction from these facts stated is, that the delivery of the tickets to Jameson, under the agreement proved, passed to him the title and created a binding obligation, on his part, to either pay the stipulated price or to return them. He failed to do so, and became liable for the price of those not returned—and it was in discharge of that liability that the notes and mortgages were given. As before stated, there was no stipulation in the agreement that Jameson should sell the tickets in Ohio, or in any other place where their sale was prohibited by law. The agreement, then, having been made in Delaware, and not prohibited by the laws of that State, and containing no stipulation to do any act in violation of the laws of any other State, was certainly valid, and is enforceable here.

Suppose Gregory & Maury had been indicted in Ohio for a breach of the penal statute referred to, could they have been convicted on proof of the facts disclosed by this record? We think not, because the facts do not show that *they* sold lottery tickets in Ohio. The only sales made by them were to Jameson. Although Jameson, in his pleadings, and throughout his deposition, speaks of himself as the agent of Gregory & Maury, yet the court must look to the agreement itself and to the course of dealing by the parties under it, to ascertain what was really intended, and what was the actual relation they sustained towards each other.

This construction of the agreement between these parties, and the effect we have ascribed to it, is sustained by ample authority.

There is a class of contracts generally called "contracts of sale or return." In these, the property in the goods passes to

the purchaser, subject to an option in him to return them within a fixed time or in a reasonable time, and if he fails to exercise this option, by so returning them, the sale becomes absolute, and the price may be recovered in an action for goods sold and delivered.

Thus, in *Moss vs. Sweet*, (3 Eng. Law and Eq. Rep., 311,) goods had been delivered to the defendant for the purpose of selling again, upon his agreement to account for such as were sold at the invoice price, with an option to return the residue within a reasonable time. The defendant had sold a portion of the goods, and had failed to return the rest. It was contended, on the authority of several cases, that the action for goods sold and delivered would not lie, as there was no absolute sale. But it was held that the failure of the defendant to return the goods rendered him liable as upon an absolute sale, and that the action for goods sold and delivered was maintainable. The previous case of *Ibey vs. Frankenstien*, in which a different doctrine had been held, was expressly overruled.

In the case of *Depew vs. Keysor*, (3 Duer, 336,) the plaintiff sued the defendant for the price of certain ranges and other hardware goods, which were delivered to the defendant upon the following agreement: "An agreement between David H. Tichenor and John H. Keysor, to-wit: The stock furnished as per bill, by D. H. Tichenor, I do agree to sell and account to him for, and pay him the cost prices, and twenty per cent. in addition for all articles sold at retail, and fifteen per cent. for all articles sold at wholesale." For the defendant it was contended that this was not a sale of the goods, but that, under the agreement, Keysor was the mere agent or factor of Tichenor, and was not liable as purchaser. The court decided, however, that he was so liable, and, in construing the agreement, said it was not the intention of the parties that the defendant should be liable to account as a factor only, for the net proceeds of future sales, retaining, as compensation for his services, all that might be realized beyond a definite sum; nor did they intend that persons, to whom sales should be made by the defendant, should be primarily liable, or liable at all to Tichenor,

the defendant being liable only as guarantor; but that, in the event of sales made by the defendant, he should be immediately and solely liable for the stipulated price, such being the true construction of the agreement—it was a contract of sale and not of agency or guaranty. To the same effect is *Marsh vs. Wickham*, (14 *Johnson*, 167.)

But it is contended that, as Gregory & Maury knew that Jameson was selling the tickets in Ohio, and that they were sent to him with an understanding that they would be sold there, such knowledge and understanding was sufficient to vitiate any contract arising upon or connected with the sale of the tickets.

This position is not sustained by the authorities. The doctrine seems to be now well settled, that a mere sale in one State or country, made with knowledge that the vendee intended to use the property to violate some positive law of another State or country, may be the foundation of an action, even in the State or country whose law was intended to be violated. Thus, when a note, made by a citizen of New Jersey, payable at a bank in that State, was discounted for by such bank, the amount being paid in notes of the bank of a less denomination than five dollars, and sent by him to the indorser of the note, residing in New York, where the circulation of such notes was prohibited by law, to be used, and actually used there in the purchase of wheat, the officers of the bank, at the time of making the discount, being informed of the use intended to be made of the notes, although there was no agreement that they should be so used; nor did it appear that the maker of the note or the officers of the bank were informed that the circulation of such notes was prohibited by the laws of New York; it was held, in an action brought in New York, by the foreign bank against the indorser, that these facts constituted no defense. It was also held, that, as the contract was made in New Jersey, and was to be performed in that State, and there being no evidence that either of the parties actually knew of the legal regulations respecting small bills, in force in New York; they were not chargeable with such knowledge.

So, in *McIntyre vs. Parks*, (3 *Met. Mass.*, 207,) it was decided, by the supreme court of Massachusetts, that a sale of lottery

tickets made in another State, where such sale was lawful, to a citizen of Massachusetts, was a valid transaction, though the seller knew that the purchaser bought them for the purpose of sale in Massachusetts, where such sale was prohibited by statute. And it was also held, that, as the tickets were ordered by a letter written and sent from Boston to the vendors at New York, the contract must be regarded as having been made in the latter State, and its legality tested by the laws in force there. We refer also to the cases of *Holman vs. Johnson*, (*Cowper*, 391,) and *Pellicot vs. Angel*, (2 *Crom.*, *Mee. & Ros.*, 311,) *Stortwell vs. Hughes*, (1 *Curtis*, 244,) as settling the same general principles.

As to the consideration of the notes and mortgage executed by Jameson to Gregory but little need be said. It appears that Jameson had, from time to time, borrowed large sums of money from banks and from individuals, for which he had given acceptances and notes which he was unable to meet, and, to avoid protest, he borrowed money from Gregory to pay off those debts. He was besides indebted to Gregory for real estate; how much that particular debt was does not certainly appear, nor is it material. It is certain that this indebtedness formed the consideration of the notes in contest, and the court below properly decided that, as to these, his defense was not sustained. His own account of the origin of his indebtedness to Gregory is confused and contradictory.

The judgment in favor of Gregory's executrix is, therefore, affirmed. The judgment, so far as it denied relief on the notes and mortgages to Gregory, is reversed, and the cause remanded with directions to render a judgment on these notes in favor of the plaintiff, and for a foreclosure of the mortgages, and for such further proceedings not inconsistent with the principles of this opinion as may be equitable and proper.

Byassee vs. Reese.

CASE 41—PETITION EQUITY—OCTOBER 8.

Byassee vs. Reese.

APPEAL FROM THE HICKMAN EQUITY AND CRIMINAL COURT.

1. A paper containing written evidence of the contract declared on, although in the record, cannot be considered, if it be not referred to in the petition.

2. If the petition does not aver that the contract declared on was in writing, nor refer to any writing, it must be assumed that it was a verbal contract. (15 B. Mon., 443; 3 Met., 474.)

3. A sale of standing trees, in contemplation of their immediate separation from the soil, by either the vendor or vendee, is a constructive severance of them, and they pass as chattles; and, consequently, the contract of sale is not embraced by the statute of frauds. (1 Green. Ev., sec. 271; 13 B. Mon., 340.) And this though no definite time be fixed for their removal.

4. The phrase, "in contemplation of immediate separation from the soil," is used to distinguish a sale of standing trees, or growing crops, which passes no interest in the land, except a license to enter upon it for the purpose of removing them, from a contract conferring an exclusive right to the land for a time for the purpose of making a profit out of the growth upon it.

5. Where standing trees are sold as chattles, the selection and marking of them by the purchaser, with the knowledge and consent of the vendor, is a constructive delivery, and the title vests in the purchaser. But—

6. In such case, if one *bona fide* purchase the land for a valuable consideration paid, and acquire title thereto, before he had notice of the sale of the trees, he is entitled to them, and the purchaser of the trees must look to his vendor for damages. That he had notice before the trees were cut would be immaterial.

A. J. JAMES, for appellant.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

Byassee filed a petition alleging that he had purchased from one Head, agent of one Walters, 100 trees standing upon land belonging to said Walters; that he was to have choice of the trees standing upon said land, and selected and marked 100 trees which said Head agreed he should have; and that Reese, with knowledge of plaintiff's right thereto, was cutting them down, and converting them to his own use; and praying that he might be enjoined from doing so, and for damages for those that had been converted.

Reese did not controvert any of those allegations in the manner required by the Code of Practice, (section 125.) except

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the allegation, that he had cut any of the trees marked by the plaintiff; but it was proved that he had cut some of them, and in his answer he claimed the right to cut them all; averring that the land had been decreed to Mrs. Walters by the Louisville chancery court, in a divorce suit, that she had sold it to Moss, and that Moss had sold it to defendant. But these averments were not sustained by any evidence.

Byassee appeals from a judgment dismissing his petition.

We find in the record a copy of a paper purporting to have been signed by Head, which contains written evidence of said sale of trees, but we cannot consider the paper, because it is not referred to in the petition. As the petition does not aver that the contract was in writing, nor refer to any writing, we must assume that it was a verbal contract. (15 *B. Mon.*, 443; 3 *Met.*, 474.)

The first question is, whether or not a sale of standing trees is embraced by that provision of the statute of frauds which relates to contracts for the sale of land. This question has produced some conflict of opinion. But, according to the weight of authority, a sale of standing trees, in contemplation of their immediate separation from the soil, by either the vendor or vendee, is a constructive severance of them, and they pass as chattles, and, consequently, the contract of sale is not embraced by the statute. (*Green. Ev.*, sec. 271.) And such is the ruling of this court. (*Cain vs. McGuire*, 13 *B. Mon.*, 340.)

The phrase, "in contemplation of immediate separation from the soil," is used to distinguish a sale of standing trees, or growing crops, which passes no interest in the land, except a license to enter upon it for the purpose of removing them, from a contract conferring an exclusive right to the land for a time for the purpose of making a profit out of the growth upon it. (See authorities above cited.)

The case under consideration clearly belongs to the former class, though it does not appear that any definite time was fixed for the removal of the trees.

As the trees were sold as chattles, the selection and marking of them by the purchaser, with the knowledge and con-

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sent of the vendor, was a constructive delivery, and the title vested in the purchaser.

But, though Byassee may be entitled to the trees, as against Walters, yet, if Reese, or his vendor, acquired title to the land by a *bona fide* purchase, for a valuable consideration paid, before he had notice of Byassee's right to the trees, Reese is entitled to them, and Byassee must look to Walters for damages. In such a state of case, the fact that Reese had notice of Byassee's claim, before cutting the trees, would be immaterial. But, if Reese had no title to the land, he was not entitled to notice.

Upon the return of the cause each party should have leave to amend his pleadings.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

 CASE 42—PETITION EQUITY—OCTOBER 9.

Barclay vs. Breckinridge, &c.

APPEAL FROM THE FAYETTE CIRCUIT COURT.

1. One who advances money to enable another to conceal his crime and stifle a prosecution against him, cannot recover. Otherwise where the offense is not a felony. And his assignee occupies no better attitude.

2. Where the facts do not show whether the act committed amounted to a breach of trust or felony, the former will be presumed.

3. Under section 1, of art. 12, chap. 28, *Rev. Statutes*, the agent of a corporation who fraudulently converts to his own use money "placed under his care or management as such officer," is guilty of a felony, no matter for what purpose it may have been placed under his care. Not so as to the agent of an individual or private banker, whose guilt, (under section 2,) consists in fraudulently converting the money, &c., "before delivery thereof at the place or to the person to whom the same were to be delivered." Under the latter section it must have been entrusted to him for delivery at some place or to some person. (3 *Gray*, 461.)

4. Where a clerk of a private banker converted to his own use money, which he charged upon the books of the banker to a depositor, his offense is not a felony.

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F. K. HUNT, for appellant, cited 4 *Blackstone*, 230, note 1, sub-div. 4; 1 *Stanton's Digest*, 391; 3 *Gray*, 461; *Chitty on Contracts*, 674; *Ib.*, 659; 14 *Penn.*, (2 *Harris.*) 18; 3 *Drane*, 184; 8 *Blackf.*, 148; 1 *Camp.*, 45; 2 *Met.*, (*Mass.*) 53; *Story on Contracts*, sec. 569.

GEO. B. KINKEAD, for appellees, cited 58 *Eng. C. L. Rep.*, 371; *Smith on Contracts*, side page 143 and note; 1 *Jones Pa.*, 81; 9 *B. Mon.*, 93.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

McLaughlin, a clerk of Tilford & Barclay, private bankers, converted to his own use \$1,500 of their money, which he charged upon their books to Marshall, a depositor. Afterward, to avoid detection by his employers, he stated the facts and his motive to Marshall, and solicited a loan of that amount of money, stating that his employers would overhaul their books in a few days, and that, if he could not effect the loan, he would be detected and ruined. Marshall refusing to lend the money, McLaughlin finally suggested that he could probably get the note of the appellees for the amount, and asked Marshall if he would advance the money upon it, which Marshall promised to do. McLaughlin then applied to the appellees, and obtained their note payable to Marshall, five days after date, for \$1,500. It does not appear what statements McLaughlin made to the appellees, nor whether they had knowledge of his object in obtaining the note; but it seems clear, from the evidence, that they executed it for his accommodation and to enable him to obtain its value from Marshall. Marshall advanced the money upon it, and afterward called on Tilford & Barclay "to receive the money upon it," and stated to them the facts before mentioned. Barclay said he could not advance the money on the note, assigning no reason therefor, but told Marshall that his brother, the appellant, would buy it, and that any arrangement that Marshall and the appellant would make would be perfectly satisfactory, and that Marshall should not have any trouble about it. Marshall sold the note to the appellant for \$1,470, and assigned it without recourse.

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This is an action upon said note. The appellee, Breckinridge, the principal in the note, answered, in substance, that McLaughlin had embezzled the funds of Tilford & Barclay, and been detected by them; that they gave him time to return the money, promising to conceal the embezzlement if he should do so, and threatening, if he should fail to do so, to prosecute him for his embezzlement; that he, with their knowledge, informed Marshall of said embezzlement, and that Marshall advanced the money on the note upon a secret promise of indemnity by Tilford & Barclay; that they promised the appellant to purchase the note; that they are, and all the time have been, the real owners of it; and that the advancement of the money by Marshall, and his sale of the note to appellant, were mere devices to conceal the fraudulent combination between Tilford & Barclay, Marshall and McLaughlin, for the procurement of the note of the appellees.

Barclay appeals from a judgment dismissing his petition.

It is clear, that the statements of the answer, if sustained by proof, constitute a valid defense, even if, McLaughlin had not committed a felony. But there is no proof of the alleged fraudulent combination between Tilford & Barclay, Marshall and McLaughlin, to obtain the note. It does not appear that Tilford & Barclay had any knowledge or suspicion of the defalcation of McLaughlin, until informed of it by Marshall, after he had advanced the money upon the note. Nor does it appear that Marshall had any motive to defraud the appellees, because, though he had been charged on Tilford & Barclay's books with the \$1,500 abstracted by McLaughlin, the charge was nugatory, and Marshall's claim on Tilford & Barclay, for the amount of his deposits, was as perfect as if it had not been made.

It may, perhaps, be inferred, from the evidence, that Marshall promised McLaughlin not to disclose his defalcation, and that he advanced the money on the note to enable McLaughlin to avoid detection. But, as he made no fraudulent representations to the appellees, and had no knowledge of such representations having been made by McLaughlin, and it does not appear that such representations were made, the appellees

have no right to complain of him for advancing the money on the note, which they executed for the purpose of enabling McLaughlin to procure its value from Marshall, and they certainly were liable to Marshall, unless the abstraction of the money by McLaughlin was a felony.

Assuming that the appellees were liable to Marshall, the facts, that Tilford & Barclay, upon this disclosure concerning McLaughlin, determined to save Marshall harmless, and that they, for that purpose, induced the appellant to buy the note, agreeing to indemnify him, cannot relieve the appellees from liability.

But, if McLaughlin had committed a felony, we incline to the opinion that the appellees did not become liable to Marshall, who probably advanced the money to enable McLaughlin to conceal his crime and to stifle a prosecution against him; and it is clear that the appellant occupies no better attitude than his assignor, Marshall.

The question, then, is, whether or not McLaughlin had committed a felony.

Whether the money was intercepted by him after being deposited, and before reaching the vault or drawer of his employers, or was taken therefrom, or was placed in his hands by his employers, does not appear. If he took it from their vault or drawer he was guilty of larceny by the common law. But we cannot assume that he took it from the vault or drawer, because the answer charges that he embezzled it. Moreover, if his interception of money, deposited, before it reached the vault or drawer, or his use of money placed in his hands by his employers, was not a felony, it must be presumed that he got it in one of those ways, rather than that he committed a felony by taking it from the vault or drawer. Assuming that he intercepted money deposited before it reached the vault or drawer, or used money placed in his hands by his employers, the question is, was he guilty of the crime of embezzlement?

Chapter 28, article 12, of the Revised Statutes, contains the following provisions:

“§ 1. If any director, or officer, or servant, of any incorpo-

rated bank, or any officer of public trust in this State, or any officer, agent, clerk, or servant of any incorporated company, embezzle or fraudulently convert to his own use, bullion, money, bank notes, or other security for money, or evidences of debt, or claim, or any effects or property of another person which shall have come to his possession, or been placed under his care or management as such officer, he shall be confined in the penitentiary not less than five nor more than ten years."

"§ 2. If any carrier, porter, or other person, to whom money or other property or thing, which may be the subject of larceny, may be delivered, to be carried for hire, or any other person who may be intrusted with such property, embezzle or fraudulently convert to his own use, or secrete with intent to do so, any such property, either in mass or otherwise, before delivery thereof to the person or at the place to whom the same were to be delivered, he shall be confined in the penitentiary not less than one nor more than five years."

It is clear that the 1st *section* has no application to this case, as McLaughlin was not an officer of a corporation, nor of a public trust. We quote it only to show the difference between its provisions and those of *section 2*, which is relied on to show that McLaughlin committed a felony.

Section 2 is substantially, and, as to the question under consideration, literally the same as a statute of Massachusetts, under which a keeper of a boarding-house was indicted for felony, and the proof was that a person handed him money, saying, "keep this till to-morrow morning for me," and that, on the following morning, the defendant denied ever having received the money, and refused to give it up, and fraudulently converted it to his own use. The court said: "This being a penal statute must be construed strictly. Although in the more natural grammatical construction, the words, 'such property,' in the clause relating to 'any other person who shall be intrusted with such property,' refer only to the words 'money, goods, or other property which may be the subject of larceny,' yet the words at the end of the section, 'before delivery of such money, goods or property at the place at which, or to the person to whom, they were to be delivered,' limit the words

'such property' still further, and, taken in connection with the words 'carrier or other person,' at the beginning of the section, confine its application to the embezzlement of property received by the defendant to be carried and delivered to another person." (*Commonwealth vs. Williams*, 3 Gray, 461.)

In our opinion, the statute of this State must receive the same construction, although it is declared that "there shall be no distinction in the construction of statutes between criminal and civil or penal enactments. All statutes shall be construed with a view to carry out the intention of the Legislature." (*Rev. Statutes*, chap. 21, sec. 15.)

Why the Legislature placed agents of corporations and agents of individuals upon different footings in this respect, we need not inquire. That they intended to do so is evident.

Under section 1, the agent of a corporation, who fraudulently converts to his own use money "placed under his care or management as such officer," is guilty of a felony, no matter for what purpose it may have been placed under his care. That the Legislature did not intend to make the agent of an individual guilty of a felony under all such circumstances, is evident from the difference in phraseology between the two sections. Under section 2, the guilt consists in fraudulently converting the money, &c., "before delivery thereof at the place or to the person to whom the same were to be delivered;" and it necessarily follows that it must have been intrusted to him for delivery at some place or to some person.

In legal contemplation, the deposit of money with the clerk of a banking house is a delivery of it to his employers, who at once become liable therefor to the depositor. Whether or not the clerk actually delivers it to his employers is immaterial to the depositor. He has no interest whatever in the disposition which the clerk may make of it, as, when deposited with the clerk, it is the money of his employers. It certainly cannot be said, with truth, that the depositor intrusts the money to the clerk for delivery to his employers.

If it should be said, that money thus deposited is intrusted with the clerk by his employers for delivery to themselves, the answer is, that, as was held in the *Commonwealth vs. Williams*,

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the statute does not apply where money is intrusted by one person to another for safe-keeping and return to the owner.

Moreover, according to the usual course of business, the clerk of a banking house is not necessarily bound to make actual delivery to his employers of money deposited; nor is he ordinarily bound to deliver to any particular person money placed in his hands by his employers. He may use the money received from either source in paying checks, or buying gold or uncurrent funds, and the conversion of such money would not be a felony. It would, perhaps, be as reasonable to say that the statute applies to a case in which money is intrusted to an agent, not for delivery at any place, nor to any person, nor to be returned to the employer, but to be used by the agent, according to his discretion, in purchasing stock for his employer, as to say that it applies to this case.

In our opinion, the circuit judge erred in holding that McLaughlin had committed a felony, and in the judgment based upon that conclusion.

The judgment is reversed, and the cause remanded with directions to render a judgment against the appellees for the debt and interest.

CASE 43—PETITION EQUITY—JANUARY 18, 1859.

Jenkins vs. Smith, &c.

APPEAL FROM THE SHELBY CIRCUIT COURT.

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1. Note given for "one hundred dollars worth of sawing," in consideration of real estate. The labor stipulated to be performed not having been demanded—*held* that there is no right of action in favor of the covenantees, and no valid or subsisting lien upon the property.

2. In an action by the holder of one of the notes given for the purchase money of a tract of land, to enforce the vendor's lien, all the incumbrances or holders of the notes are necessary parties. They may assert their liens in their answers, where they are defendants; and service of process upon such answers is not necessary. In such case formal interpleading is not necessary.

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3. The act authorizing cross-petitions, and process to issue thereon, as between co-defendants, does not affect the principles applicable to the case *supra*.

Smith, assignee of Standeford sued Jenkins upon a note for \$500, part of the consideration for certain real estate purchased by Jenkins of Standeford, seeking a personal judgment and the enforcement of the vendor's lien.

Willis and wife and Hughes and Vandyke, who held the notes for the balance of the purchase money, were also made defendants, together with Standeford. Jenkins answered, setting up, by way of counter-claim or set-off, the sum of \$281.35, mentioned in the opinion, as having been paid by him in discharge of a lien upon the property in favor of Jones and Busey, the vendors of Standeford. Willis and wife and Hughes and Vandyke answered, setting up the notes held by them and asserting liens therefor upon the property, and made their answers cross-petitions, upon which, however, there was no service of process. The circuit court rendered judgment enforcing the liens asserted by the plaintiff and defendants, Willis and wife and Hughes and Vandyke, from which Jenkins appealed.

The case was decided by the Court of Appeals on the 18th of January, 1859, and the opinion then delivered was, on the 9th of October, 1863, ordered to be published.

REPORTER.

THOS. J. THROOP, for appellant, cited *Civil Code*, sections 153, 126.

JOHN RODMAN, on same side, cited 14 *B. Mon.*, 312; *Act approved December 16, 1857, amending the Civil Code*.

T. B. COCHRAN, for appellees, cited *Smith's Leading Cases*, 225 *top page*; 9 *Met.*, 347-8; 7 *Humphreys*, 270; 19 *Penn. State Rep.*, 181; 18 *B. Mon.*, 820; 16 *Ib.*, 350; *Civil Code*, sections 577, 578.

J. T. CALDWELL, on same side, cited *Civil Code*, section 128.

JUDGE DUVALL DELIVERED THE OPINION OF THE COURT:

The appellant relies upon two grounds for a reversal of the judgment in this case:

1. That the demand set up by him in his answer, by way of counter-claim or set-off, was not controverted by the appellees, and should, therefore, have been allowed by the court.

2. That he was not served with process upon the answers and cross-petitions of the defendants, Willis and wife and Hughes and Vandyke.

Upon the first point we are satisfied that the facts stated in the answer of Jenkins, are wholly insufficient to authorize the legal deduction that there existed any lien in favor of the vendors of Standeford, upon the property in contest. The answer alleges, it is true, that the notes of Standeford to his vendors, Jones and Busey, \$281.35 of which was paid by the appellants, were unpaid at the time the latter purchased the property from Standeford, and that those notes constituted an incumbrance or liens upon the property which the appellant had a right to discharge for the protection of his own title. But the notes are exhibited with the answer, and they show upon their face that they were payable, not in money, but in sawing—in other words, each of the three notes is for “one hundred dollars worth of sawing.” For all that appears in this record, there has been no breach of this contract by Standeford. It is not alleged in the answer that the labor stipulated to be performed had ever been demanded, and it is clear that, without such demand, no right of action in favor of Jones and Busey, the covenanters, had accrued. (*Hawkins vs. Bull*, 18 B. Mon., 820.) It follows that the obligations on which the alleged payments were made by the appellant, could not have been enforced at the time, either at law or in equity, and, of course, they constituted no valid or subsisting lien upon the property. Besides, it does not appear, from the answer or the exhibits filed with it, that the conveyance from Jones and Busey to Standeford, reserved or created a lien upon this property, by which the payment of the notes relied upon would have been secured, according to the provisions of the Revised Statutes.

In regard to the second objection relied upon, we remark, that the judgment complained of was rendered at the March term, 1858, directing a sale of the property for the satisfaction

of the several demands set up by the plaintiff, and by the defendants, who were holders of the notes which the appellant had given for the purchase money of the property. Those defendants had been brought before the court by amended petitions filed by the plaintiff, and they had each answered, setting up the notes they respectively held, by assignment from Standeford, and asking that the proceeds of the sale of the property might be distributed equally, or rateably, among the several holders of the notes. They sought no personal judgment upon the notes against their co-defendant, Jenkins. At the succeeding July term of the court the commissioner filed his report of the sale. It does not appear, from the record, that the appellant made any objection whatever, either to the judgment or to the sale made in pursuance of it. Under these circumstances it might be well questioned whether he should be allowed to complain here, for the first time, that he had had no *legal notice* of the demands set up by his co-defendants, even if it were conceded that this was a case in which cross-pleadings and service of process upon them was necessary.

But we do not concede that service of process upon the answers of the defendants, in which they set up their respective demands and liens upon the property sought to be subjected to sale for payment of the purchase money, was necessary in this case. Before the adoption of the Civil Code, this court had recognized the general rule of equity practice, according to which one defendant could not be entitled to a decree against a co-defendant, without asking for it in a cross-bill and the service of process thereon. But it was held, that the rule was not universal, and extended only to those cases to which the reasons for it applied; that, for instance, it did not apply to a suit in chancery by one distributee against an administrator and co-distributee; or by one legatee against his co-legatees, and the executor, for ascertaining and distributing a fiducial fund, in which all the distributees and legatees have a *common interest derived from the same source*. In such a case, the administrator or executor has a right to require a comprehensive decree, settling and distributing the entire fund

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among all who may be entitled to it; and the nature of the case and end of the suit, as in a suit for an account, or for settling a partnership, dispense with the necessity of formal interpleading. (*Caldwell's ex'r. vs. Kinkad, &c.*, 1 B. Mon., 228.)

It seems to us that all the reasons for the exceptions to the rule, enumerated in the case cited, apply with equal propriety to the class of cases to which the one under consideration belongs. Here, all the incumbrances or holders of the notes, which Jenkins had executed for the purchase money, were necessary parties to the action, and were necessarily required to be brought before the court, before the plaintiff could have been entitled to any judgment for a sale of the property. The object of the suit was to create, by the sale of the property, and to distribute among all the incumbrances, equally or rateably, a fund in which they all had a common interest, derived from the same source, and, consequently, Jenkins himself had an obvious right to require a comprehensive judgment, by which the entire amount of liens should be ascertained, and the entire fund distributed among all who were entitled.

It seems to us that the principle which dispenses with the necessity of interpleading between the defendants, where the action is by a legatee against his co-legatees and the executors, is equally applicable to cases like the present. And the provisions of the Civil Code, so far from restricting the rule, have necessarily, we think, extended its operation. It is well known that no provision was made, by the Code, for cross-pleadings by one defendant against another; and, by section 36, "of the parties to the action, those who are united in interest *must* be joined as plaintiffs or defendants." Now, in cases where the fund to be distributed amongst several claimants is less than the aggregate amount of the claims, there would, in general, be no such unity of interest among the claimants as would authorize them to join as plaintiffs in the action, and the plaintiff, suing to enforce his demand, would, therefore, be required to make all the rest defendants, thus presenting a case in which no relief could have been granted, either to the plaintiff or the defendants, upon the hypothesis that no judgment could be rendered for the defendants against their co-defend-

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ant without cross-pleadings and the service of process. There is nothing in the recent act authorizing cross-petitions and process to issue thereon, as between co-defendants, which can affect the principles applicable to this case.

The judgment is affirmed.

CASE44 —PETITION ORDINARY—JULY 9.

Norris vs. Doniphan.

APPEAL FROM THE MASON CIRCUIT COURT.

1. The act of Congress, approved July 17, 1862, entitled, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," after declaring that all the estate and property, money, stocks, and credits, of certain officers of the Confederate States, and of certain other persons therein mentioned, shall be seized and confiscated, by proceedings *in rem* in the Federal courts, declares that, "it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." *Held*, First, that the last named provision applies to suits for the recovery of debts; secondly, that it was designed to apply to suits in the State as well as the Federal courts.

2. If the provisions of the act, concerning the seizure and confiscation of such property, are unconstitutional and void, it seems clear that Congress has no power to prohibit the State courts from giving to the owners the relief to which they are entitled by the laws of the States.

3. The forfeitures, or confiscations, proposed by this act, are to be effected on account of offenses which the owner may commit, without reference to the use of his property; hence, the doctrine that property which is used to violate a blockade, or revenue laws, may be forfeited by proceedings *in rem*, without conviction of the owner, has no application to this case.

4. That clause of the constitution which authorizes Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," has no bearing on this question. It relates only to wars with foreign nations. (*The Brilliant vs. United States*.)

5. The usage of nations, if applicable to the case, does not sanction the confiscation of property here belonging to rebels, and debts owing to them, before the commencement of hostilities.

6. A sovereign, engaged in a public war, may disregard the usage of nations and establish a different rule toward the enemy, which shall bind those within his jurisdiction.

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7. The existence of a public war gives to Congress the power, as a belligerent right, to confiscate enemy's property on land, though such is not the usage of nations.

8. Congress possessed the power to pass the act in question if the existence of civil war gives to the government all the belligerent rights, against rebellious citizens, which it possesses against alien enemies during a public war.

9. The authority to make war for the suppression of rebellion is derived from those clauses of the constitution which declare that, "the President shall take care that the laws be faithfully executed," and that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

10. The right, given by the constitution, to make war upon rebels, gives the power to perform acts of war, and no other power whatever.

11. The seizure and confiscation of enemy's property on land are not acts of war. (*Brown vs. United States*, 8 Cranch.)

12. The constitution does not prohibit the confiscation of the property of alien enemies. The protection received by aliens, residing abroad, with reference to their property here, is due, not to the constitution, but to international comity, which may be suspended during war. But the constitution, and not the law of nations, governs the relations between the government and citizens of the United States. They, though traitors, must be dealt with according to the constitution.

13. The act under consideration is unconstitutional, because it attempts to authorize the confiscation of the property of citizens, as a punishment for treason and other crimes, without due process of law, by proceedings *in rem* in any district in which the property may be, without presentment or indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt as would be sufficient proof of any fact in admiralty or revenue cases. (*Con.*, art. 3, sec. 2, sub. 3, and sec. 3, sub. 1; 5th and 6th amendment.)

14. Suit upon a note. The answer avers that when the rebellion commenced the plaintiff resided in Missouri, became a secessionist, actually joined the Confederate government, and moved to Arkansas, where she could better have its protection, and where she has continued to this time to give aid and comfort to the rebellion by her means and money: *held*, upon demurrer, that, if the statements of the answer are true, the plaintiff cannot, upon common law principles, maintain an action here during the war; and her petition should be dismissed without prejudice.

F. T. HORD and JAMES HARLAN, for appellant.

HARRISON TAYLOR for appellee.

JUDGE BULLITT DELIVERED THE OPINION OF THE COURT:

In September, 1862, the appellee, Rebecca Doniphan, by her attorney, filed a petition seeking to recover from the appellant \$5,000 due upon his note to her, executed in the year 1860.

The appellant filed an answer, alleging that when the present rebellion commenced, the said Rebecca resided in the State of Missouri, and became a secessionist, and actually joined the confederate government, and moved to the State of

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Arkansas, where she could better have the protection thereof, and where she has continued to this time to assist and give aid and comfort to the rebellion by her means and money; that, on the 22d day of July, 1862, the President of the United States issued his proclamation, as required by the 6th section of the act of Congress, approved July 17, 1862, and entitled "an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and that the said Rebecca has not returned to her allegiance to the United States, but still remains in Arkansas, assisting the rebellion, and giving aid and comfort to the rebels, by giving to them money to carry on the said rebellion; and he pleaded the act of Congress in bar, and prayed that the petition might be dismissed.

A demurrer to the answer was sustained, and a judgment rendered against the defendant, to reverse which he prosecutes this appeal.

The above mentioned act of Congress declares that any person, who shall commit treason, shall be punished by death and by the liberation of his slaves, or by fine and imprisonment and the liberation of his slaves; and that any person, who shall incite or engage in any rebellion or insurrection, or give aid and comfort thereto, shall be punished by imprisonment, or by a fine and the liberation of his slaves, or by both of said punishments, at the discretion of the court; and then, after directing the President to seize all the property of certain officers, civil and military, of "the so-called Confederate States of America," and of certain other persons therein mentioned, and to use the same and the proceeds thereof for the support of the army of the United States, declares as follows:

"§ 6. *And be it further enacted*, That if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the United States, cease to aid, countenance and abet such rebellion, and return to his allegi-

ance to the United States, all the estate and property, money, stocks and credits of such person shall be liable to seizure as aforesaid; and it shall be the duty of the President to seize and use them as aforesaid, or the proceeds thereof; and all sales, transfers or conveyances of any such property, after the expiration of the said sixty days from the date of such warning and proclamation, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property or any of it, to allege and prove that he is one of the persons described in this section."

The 7th section authorizes proceedings *in rem*, in the district courts of the United States, to be instituted in any district in which the property or any part thereof may be found, or into which the same, if movable, may first be brought, which shall conform as nearly as may be to proceedings in admiralty or revenue cases, "to secure the condemnation and sale of any of such property, after the same shall have been seized, so that it may be made available for the purposes aforesaid."

By a joint resolution adopted July 17, 1862, it was declared that no "punishment or proceedings under said act shall be construed to work a forfeiture of the real estate of the offender beyond his natural life."

The act does not authorize the State courts to condemn such property. It can only be condemned by the district courts of the United States. The only provision of the act that can possibly be regarded as designed to control the action of the State courts, with reference to the proceedings which it authorizes, is that which declares that "it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Does this provision apply to suits for the recovery of debts? The 6th section declares that "all the estate and property, moneys, stocks and credits" of the persons therein described shall be seized, &c.; and that all sales, transfers or conveyances "of any such property" shall be void, and that it shall be a sufficient bar to any suit for the possession or use "of

any such property," to allege, &c.; and the 7th section authorizes the proceedings before mentioned to secure the condemnation and sale "of any of such property." It seems clear that the words "such property" were designed to embrace all the property first mentioned, namely: "All the estate and property, moneys, stocks and credits" of the persons described in the act.

But does the provision concerning pleas in bar relate to the State courts? If it does, and is valid, a State court may render a judgment in bar of an action, upon the ground that the plaintiff is a rebel; and the district court, having jurisdiction over the subject, may afterward refuse to confiscate the property, upon the ground that he is not a rebel.

It seems unreasonable to suppose that Congress intended to make a rule capable of producing such a result. But it seems equally extraordinary that Congress should have contemplated other results, of a similar character, that were evidently aimed at by the act in question; which undertakes to authorize the seizure by the President and condemnation by a district judge, of the property of any citizen whom those officers may consider guilty of either of the offenses mentioned in the act, without a trial by jury, or upon a trial by jury in any district in which any of the property may be found, or into which, if movable, it may first be brought; whilst, by the same act, for the same offense, the same citizen is made amenable to a criminal prosecution, which, after his property has been confiscated, and the proceeds expended by the President, may result in his acquittal by a jury in the State and district in which the offense may be alleged to have been committed.

The provision prohibiting the rendition of judgments in favor of persons described in the act, was evidently made chiefly for the purpose of facilitating the seizure and confiscation of their property by the agents and courts of the United States. The State courts, by rendering judgments in favor of such persons, might seriously impede the efforts of those agents and courts to seize and confiscate such property. In view of these facts, and of the comprehensive language of the provision,

our opinion is, that it was designed to apply to suits in the State as well as the Federal courts.

Although Congress could not have required the State courts to take jurisdiction over proceedings for the confiscation of such property, if it had attempted to do so, yet it ought perhaps to be conceded, and will be conceded for the purposes of this case, that, if Congress has the power to authorize the seizure and confiscation of the property of the rebels in the manner contemplated by this act, it has also the incidental power to prohibit the recovery of such property, by such persons, in the State courts. But, on the other hand, if the provisions of the act, concerning the seizure and confiscation of such property, are unconstitutional and void, leaving the rights of the owners unimpaired and indefeasible, it seems clear that Congress has no power to prohibit the State courts from giving to them the relief to which they are entitled under the laws of the States.

Thus the question arises, whether the provisions of the act, authorizing the seizure and confiscation of the property of rebels, are valid, or unconstitutional and void.

The cases in which it has been held, that property with which the owner has attempted to violate a blockade, or revenue laws, may be forfeited by a proceeding *in rem*, without a conviction of the owner, have no bearing on this question. Those cases rest upon the ground, that "the thing is primarily the offender, or rather the offense is primarily attached to the thing." (*Per Story, Justice, in The Palmyra*, 12 *Wheaton*, 14.) But the forfeitures, or confiscations, contemplated by the statute under consideration, are to be effected, not on account of any use of the property by its owner, but on account of offenses which the owner may commit without reference to his property.

Counsel seek to sustain the power of Congress thus to punish rebels, upon several grounds:

1. It is contended that this power can be exercised under that clause of the constitution which authorizes Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." That clause,

however, has no bearing on this question, because it relates only to wars with foreign nations, as was recently decided by the Supreme court of the United States, in the cases of *The Brilliant etc. vs. United States*, (reported in the Law Register, April, 1863.)

2. It is contended, that the right to confiscate the property of rebels is conferred on the government of the United States by the law of nations.

The usage of nations, if applicable to the case, does not sustain this effort to confiscate property here belonging to rebels, and debts owing to them, before the commencement of hostilities; for it is settled that the modern usage of nations does not sanction such confiscation of the property of even alien enemies (*Bell vs. Chapman*, 10 John., 183; *Hutchinson vs. Brock*, 11 Mass., 119; *Brown vs. United States*, 8 Cranch, 110; 1 *Kent's Com.*, 92.)

It must be conceded, however, that the courts of a sovereign, engaged in war, cannot compel him to observe the usage of nations, nor treat as void any act of his because it violates that usage. The law of nations has no obligatory force upon him in dealing with his subjects. He may disregard it, and establish a different rule; and if he does so, those within his jurisdiction must observe the rule so established, however it may conflict with the usage of nations. In the absence of any positive law to the contrary, the usage of nations may furnish a rule for the guidance of courts of justice; but they cannot be governed by it in the presence of a positive conflicting law made by a sovereign who may choose to disregard it. This is all that Chief Justice Marshall meant when he spoke of "the modern usage of nations which has become law." (*United States vs. Percheman*, 7 Peters, 86,) as is shown by his opinion in the case of *Brown vs. United States*, (8 Cranch, 110,) in which he used this language:

"This usage [of nations] is a guide which the sovereign follows or abandons at his will. The rule, like other rules of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded .

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* * * Respecting the power of the government [to confiscate the property of alien enemies on land] no doubt is entertained. That [public] war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed no power of condemnation can exist in the court."

It seems, therefore, that the act of a sovereign, exercising belligerent rights against a separate nation, however grossly it may violate the usage of nations, gives the law by which, at least, all courts and persons within his jurisdiction must be governed. And, as the existence of a public war gives to Congress the power, as a belligerent right, to confiscate enemy's property on land, though such is not the usage of nations, it follows that Congress possesses the power to pass the act under consideration, if the existence of civil war gives to the government all the belligerent rights against its rebellious citizens, which it possesses against alien enemies during a public war.

The constitution of the United States declares that the President "shall take care that the laws be faithfully executed," and that Congress shall have power "to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." It will be conceded, for the purposes of this case, not only that these provisions authorize the government to make war for the suppression of an insurrection, which takes the shape of war, as the present one has done, but that the army and navy may lawfully prosecute the war as if it were a war with alien enemies, and according to the usages of public wars. Does it necessarily follow that the rebels may lawfully be treated as alien enemies by all the departments of the government? We believe not.

The right, given by the constitution, to make war upon rebels; gives the power to perform acts of war, and gives no other power whatever.

Civil wars being, in many respects, of the same nature as public wars, the right to treat armed rebels, in many respects, as if they were alien enemies, necessarily results from the power to make war upon them.

The facts, that prisoners are exchanged, that flags of truce are respected by the opposing forces, that armed rebels may be lawfully slain in battle, that their arms, ammunition and stores may be lawfully taken and used or destroyed, that articles, contraband of war, being sent to them, may be lawfully confiscated, that their ports may be lawfully blockaded, and that their property on the high seas may be lawfully seized as prize of war; these facts prove that civil wars are, in many respects, the same as wars between separate nations; and they prove nothing more. These being acts of war, the right to perform them necessarily results from the power to make war.

But the fact that the army may fight rebels, as if they were alien enemies, does not prove that Congress can legislate against them as if they were alien enemies.

The courts have as much right to treat them as alien enemies by refusing to try them for treason, as Congress has to treat them as alien enemies, by confiscating their property.

Circumstances may arise which would authorize the army to destroy the dwelling-house of a rebel. Can Congress, for that reason, confiscate all the dwelling-houses of rebels? If so, it can, for the same reason, confiscate the dwelling-houses of friendly citizens, in States adhering to the union; for the army may destroy the latter, as well as the former, to save itself from destruction.

In the case of *The Amy Warwick*, in the United States district court, for the district of Massachusetts, Judge Sprague, after stating, that "in war, each belligerent may seize and confiscate all the property of the enemy wherever found," and that "this right extends to the property of all persons residing in the enemy's country," expressed the opinion, that,

in this civil war, "the United States, as a nation, have full and complete belligerent rights, which are in no degree impaired by the fact that their enemies owe allegiance, and have superadded the guilt of treason to that of an unjust war." We are not prepared to admit that Congress has the power to confiscate the property of persons residing in the rebellious States, who have given no aid to the rebellion, or who have given it no aid except upon compulsion, and who have given all the aid they could to the government of the United States, whilst receiving from it none of the protection to which they were entitled. The conclusion arrived at by Judge Sprague, if correct, proves that Congress has the power to confiscate the property of such persons. And we do not perceive how that conclusion can be avoided, if the law of nations governs this controversy, or if, in other words, the government of the United States possesses, in this contest, all the rights of a belligerent engaged in a public war.

If the law of nations governs the relations of the parties to this contest, it gives to each of them precisely the same rights. If it gives to the Federal government the right, as a belligerent, to confiscate real estate, and personal property on land, belonging to rebels, it gives to the confederate government the right, as a belligerent, to confiscate like property of citizens adhering to the Federal government; and confiscation sales, made by the confederate authorities, would pass valid titles, which could not be annulled by the courts of the United States, after the suppression of the rebellion. This is unquestionable, if the relations of the parties to this contest are governed by the law of nations.

But, to meet this difficulty, it is contended that the rebels are, in legal contemplation, and may lawfully be treated, as, at the same time, alien enemies and rebellious citizens; and that the government has against them, at one and the same time, all the rights conferred upon it by the constitution over citizens of the United States, and all the rights conferred by the law of nations upon a belligerent engaged in a public war.

This, in our opinion, cannot be, because the law of nations and the constitution of the United States are, in many respects, inconsistent with each other. Their co-existence and co-oper-

ation are, therefore, in many respects impossible, and would produce irreconcilable conflicts between different departments of the government. For instance, under the law of nations it is the right and duty of the army to treat rebels taken in arms as prisoners of war; but under the constitution it is the right and duty of the courts to treat them as traitors. We do not perceive how that conflict can be avoided, except by holding that the constitution, alone, governs the relations between the parties to this contest; that it governs the army, as well as the President, the Congress, and the courts, with reference to the conduct of the war; and that it gives to the army, as an incident inseparable from the power to prosecute the war, the same right to treat rebels, taken in arms, as prisoners of war, which it gives to the courts, under other circumstances, to treat them as traitors.

It has been said that, during a civil war, the sovereign may exercise both belligerent and sovereign rights. (*Per Ch. Justice Marshall, in Rose vs. Himely, 4 Cranch, 272; The Brilliant, etc. vs. United States, supra*) This cannot be doubted, but it does not prove that the sovereign may treat those in rebellion both as alien enemies and as rebellious subjects; nor is anything to that effect contained in either of those cases. On the contrary, in the last mentioned case, it was declared that all persons residing within the Confederate States, "whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated *as enemies, though not foreigners.*"

Unquestionably the usage of nations, in the conduct of public wars, may be considered for the purpose of ascertaining what are the rules of civil war, and what is the meaning of those provisions of the constitution which authorize the government to prosecute such a war; just as the common law, though the constitution does not make it the law of the government of the United States, may be considered for the purpose of ascertaining the meaning of several provisions of the constitution. And, though the law of nations does not govern the relations existing between the parties to this war, it of course governs their several and mutual relations to other na-

tions. It governs our intercourse with foreign nations, as it has hitherto done, and must be considered by us, as it is by them, in determining questions of blockade, and of prize, and other questions touching our foreign relations. Such were the questions involved in the cases of *The Brilliant, etc. vs. United States, supra*.

In our opinion, the law of nations can have no other application to this contest. But if we err in that opinion, it does not follow that this government can exercise all the powers conceded to belligerents by that law. What we have stated, and the language which we cited from Chief Justice Marshall's opinion in the case of *Brown vs. United States*, concerning the powers of a belligerent sovereign, relate to unlimited sovereignties. The law of nations cannot convert a limited into an unlimited sovereignty. It cannot be substituted for the constitution of the United States in war any more than in peace. The constitution was designed to be perpetual, and neither the President nor the Congress has power to suspend it, in war or in peace. Even if the law of nations applies to this contest, it cannot confer upon the government any power, the exercise of which is prohibited by the constitution, or which is inconsistent with the nature of the government established thereby. The law of nations concedes to a sovereign, who has closed a war by conquest, the right to establish any form of government that he may choose over the conquered nation. Consistently with that law he may completely change their municipal laws and political regulations; he may convert a free commonwealth into a dependent province, and govern it despotically. Why may not similar powers be exercised by this government over the people of the Southern States? If it can deprive them of their rights of property, in the manner proposed by the act under consideration, why may it not, by a sweeping act of outlawry, deprive them of the right of suffrage, and of all other of their rights as citizens of the Union and of the States in which they reside? If it may adopt any policy it pleases for the purpose, or the avowed purpose, of subduing them, why may it not adopt any policy it may please for the purpose, or the avowed purpose, of holding them in

subjection after subduing them? Yet it seems clear, that such powers cannot be lawfully exercised over them if the rebellion should be subdued, because they are inconsistent with the nature of the government, and the exercise of them is prohibited by the constitution, which declares that "the United States shall guarantee to each State in this Union a republican form of government," and which contains many other provisions that are entirely incompatible with the exercise of the powers in question.

If Congress had the power to enact this statute, it can adopt such measures as may be necessary to carry it into effect. It is probable that, in order to carry its provisions into effect, it will be necessary not only to defeat and disperse the Southern armies in the field, but to subjugate the people of the Southern States, and to hold them in a condition of permanent subjection to the government of a nominal Union, to be controlled by the people of the other States, unless they also should lose their liberties in an effort to subjugate others. It seems certain that the framers of the constitution did not mean to clothe Congress with the power thus to destroy the government.

The facts, that the constitution declares, that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort;" that it prescribes the mode of trying citizens charged with levying war against the United States, and the place of trial, and that it limits the punishment of them, proves that its framers did not contemplate a suspension of its provisions by civil war, nor a denial to traitors of its guarantees, nor the exercise over them of powers which it does not confer.

The right of a sovereign to establish courts of prize in a conquered country is conceded by the law of nations. But it was decided by the Supreme Court of the United States that, during the war between the United States and Mexico, neither the President nor any inferior executive officer could establish a court of prize in territory conquered from Mexico. The court said:

"All captures *jure belli* are for the benefit of the sovereign

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under whose authority they are made; and the validity of the seizure and the *question* of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And, under the constitution of the United States, the judicial power of the general government is vested in one supreme court and in such inferior courts as Congress shall from time to time establish. Every court of the United States must, therefore, derive its jurisdiction and judicial authority from the constitution or laws of the United States; and neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals, in prize cases, nor to administer the law of nations." (*Joker vs. Montgomery*, 13 *Howard*, 515.)

That case proves that the powers of each department of the government of the United States are limited by the constitution, even during a war with a foreign nation, and within its territory. It is clear, therefore, that no department of the government can relieve itself from the restraints of the constitution within the territory of the United States, and in a war with its citizens.

It seems equally clear, that the constitution does not authorize the confiscation of the property of a rebel, because of his crime, without a trial by jury of the offender and his conviction "by due process of law," (5th amendment,) unless the power can be derived from those provisions of the constitution which authorize the government to suppress insurrections. Whether or not the power can be thus derived depends upon the question whether or not such confiscation is an act of war.

The right of the government of the United States, during either a public or civil war, to confiscate enemy's property taken upon the high seas is not denied. This is an act which is made lawful by the declaration or existence of war, and need not be authorized by Congress. The seizure, in such cases, is a purely military act, and its sanction, by a judicial condemnation of the property, does not deprive it of that character, but justifies it, as such, to foreign nations, whose citizens may have an interest in the property.

But the seizure and confiscation of enemy's property on land, which is not contraband of war, are not acts of war. If they were, they could be performed by the army, or be made lawful by an order of the commander-in-chief, without other authority than that conferred by the declaration or existence of war. It has been decided, however, by the Supreme Court of the United States, that the declaration and existence of war between the United States and Great Britain did not authorize the confiscation of enemy's property on land, and that it could not be confiscated except by virtue of an act of Congress. (*Brown vs. United States, supra.*) That decision proves that the seizure and confiscation of enemy's property on land are not acts of war.

In that case it was conceded that, in a public war, such right of confiscation belongs to Congress, as a belligerent right; and we are not disposed to question the correctness of that concession. But it does not follow that Congress has the same belligerent right against rebellious citizens of the United States. The restrictions in the constitution upon the powers of the government were designed to protect the people of the United States, and not aliens resident abroad. The protection received by aliens, residing abroad, with reference to their property here, is due to international comity, and not to the constitution of the United States. War may authorize the government to refuse comity to its enemies, but cannot authorize it to suspend the constitution, by virtue of which alone it has a right to exist. And, moreover, as has been shown, the constitution contains a provision authorizing Congress "to make rules concerning captures on land and water," during public wars, which does not apply to civil wars. In our opinion, the existence of civil war does not confer upon this government any belligerent right whatever, except the right to perform acts of war for the suppression of the rebellion. We have shown, at any rate, that the law of nations concedes to belligerents many powers which cannot be exercised by this government, and that it cannot exercise any of those powers which are in conflict with the constitution.

Though the constitution declares that, "no person shall be

deprived of life, liberty, or property, without due process of law," yet a rebel may lawfully be slain in battle and thus be deprived of life, or he may lawfully be captured in battle and thus be deprived of liberty; because these, being acts of war, are authorized by those other provisions of the constitution which authorize the prosecution of the war. But those provisions do not authorize the confiscation of his property in the manner proposed by the statute under consideration, because such confiscation is not an act of war. Nor is such confiscation authorized by any other provision of the constitution. On the contrary, it is prohibited.

The 5th amendment, declaring that "no person shall be deprived of life, liberty, or property without due process of law nor shall private property be taken for public use without just compensation," prohibits the confiscation or forfeiture of the property of any citizen of the United States, unless it can be sustained as a purely military act, which, as has been shown, cannot be done with reference to the property aimed at by the statute under consideration, or unless it can be sustained as a punishment for treason, or other crime, the punishment of which Congress is authorized to prescribe.

The confiscation aimed at by the statute under consideration cannot be sustained as a punishment for treason, because the statute undertakes to authorize the condemnation of the property by a district court, in any district in which any of the property may be found, or into which, if movable, it may first be brought, without presentment or indictment by a grand jury, without the arrest or summons of the owner, and upon such evidence of his guilt as would be sufficient proof of any fact in admiralty or revenue cases; whilst the constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; (5th amendment;) that the trial of all crimes, except in cases of impeachment, shall be by jury, and shall be held in the State where the said crime shall have been committed; (art. 3, sec. 2, sub. 3;) and shall be by an impartial jury of the

State and district wherein the said crime shall have been committed, and that the accused shall enjoy the right to be confronted with the witnesses against him; (6th amendment;) and that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. (*Art. 3, sec. 3, sub. 1.*) And these provisions, except the last one, render it equally clear that this attempt at confiscation, or rather at forfeiture, cannot be sustained as a punishment for any crime less than treason.

If, therefore, the act should be regarded, as we believe it must be, as an attempt to punish citizens for treason, or for aiding or abetting the rebellion, it is unconstitutional and void, because it authorizes a trial of those crimes in a mode different from that required by the constitution.

If it should be regarded as an attempt, not to punish those citizens for crime, but to support the army of the United States with the proceeds of their property, it is unconstitutional and void, because it makes no provision for compensation. The constitution does not recognize military necessity, nor any other necessity whatever, as an authority for "taking private property for public use," in peace or in war, without just compensation.

Whether or not the provisions of the act concerning the confiscation of personal property are in conflict with that clause of the constitution, which declares that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," is a question upon which a majority of the court deem it unnecessary to express an opinion. Upon this point Judge Williams dissents, and proposes to write his own separate opinion.

3. It remains to be determined whether or not, upon common law principles, the appellee can, during the war, maintain an action for the money claimed in her petition.

This question is entirely distinct from that relating to the right of confiscation, and depends, as we have just intimated, not upon the constitution, nor upon the law of nations, but upon the common law. The fact, that the government is not authorized by the constitution to confiscate the debt, does not

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prove that the appellee is entitled, by the common law, to recover the money, during the war, and take it to Arkansas, where it may be used against the government.

By the common law, though war does not create a forfeiture of the rights of alien enemies, growing out of pre-existing contracts, it is settled that the right of action of an alien enemy, residing in the enemy's country, is suspended by war during its continuance.

It is from reasons of national policy that the alien is prevented from recovering the money and carrying it out of the country during the war. (*Levine vs. Taylor*, 11 Mass. R., 12; *Russell vs. Skipwith*, 6 Binney, 249.)

As we have remarked, this insurrection has taken the shape of war. Those engaged in it have established a *de facto* government, complete in all its parts, and exercising sovereign powers over an extensive territory. "It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemy's territory, because it is claimed and held in possession by an organized, hostile, and belligerent power. All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners." (*The Brilliant, etc. vs. United States.*)

Whether or not merely residing in that territory would render a person liable to be treated as an enemy, is a question upon which we need not express an opinion.

We are satisfied that, if the statements of the answer are true, those principles of the common law, which suspend an alien enemy's right of action during war, apply to this case, and forbid our courts from aiding the appellee to recover money which might be used by her to support the war against the United States.

The Code of Practice does not authorize a plea in abatement. But one of the grounds of defense that may be presented in the answer is, "that the plaintiff has not legal capa-

city to sue." If the facts stated in the answer are true, the petition should be dismissed without prejudice.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

JUDGE WILLIAMS delivered his separate opinion, as follows:

In 1862 Rebecca Doniphan sued Norris on his note for \$5,000, then due.

Norris, for defense, alleged that the plaintiff was a resident of Missouri when the present rebellion broke out; that she became a secessionist, and actually joined the Confederate States government, moved to the State of Arkansas, where she could better have the protection thereof, and where she has continued to this time, to assist and give aid and comfort to the rebellion by her means and money; that, on the 22d day of July, 1862, the President of the United States issued his proclamation, as authorized by section 6, of the act of Congress, approved July 17, 1862, and entitled, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and that said Rebecca has not returned to her allegiance to the United States, but still remains in Arkansas, assisting the rebellion, and giving aid and comfort to the rebels, by giving to them money to carry on said rebellion; and he pleads the aforesaid act of Congress in bar.

A demurrer was sustained to this answer, and judgment rendered for plaintiff, of which appellant complains and asks a reversal.

The said section of said act authorizes these facts to be plead in bar in any suit; and, if said act of Congress is constitutional and obligatory as law, the courts in all the loyal States should administer it as part of the laws of the land, and for the purpose of withholding from the rebels the means sought to be recovered, and to enable the United States, through its courts, to recover the same. Therefore, we cannot, if we would, avoid the decision of the great issues and momentous questions arising out of this act.

The first question naturally arises, whether those who are now waging war against the United States are in rebellion,

are traitors and have committed treason? or are they merely exercising a constitutional right in withdrawing from the Union, disregarding their allegiance to the United States, and rejecting and repudiating its authority? For, if the latter, they have committed no crime, and are therefore not legally liable to punishment.

In regarding the various powers of the United States government, as found in its constitution, it is impossible not to recognize its sovereignty. It has numerous and vast sovereign attributes. It has citizens, in the most comprehensive and perfect sense of the term, with all their relations and duties, and as much so as exist between the State and citizen. Can the State try him, and punish with fine and imprisonment, and even death, his offenses against her? So can the United States. Can the State take his property for public purposes against his will? So can the United States. Can she lay taxes on him and his property? So can the United States. Can she compel him to serve in the militia? So can the United States. Can she require him to attend as a jurymen, or a witness, in her courts? So can the United States. Can she command him to aid her sheriff, as one of the *posse comitatus*, in executing the laws? So can the United States.

There is no difference between the relation which the citizen bears to the State and the United States, as to political and civil ties, save that the relation to the United States is of a more comprehensive character—being not only the same domestic and municipal relation, but the more extensive one, still, which corresponds to the whole circuit of national and international rights and duties.

And, drawing with these corresponding duties, the corresponding right of protection *every where*, the States, by adopting the constitution of the United States, declare that they cannot and will not longer protect their citizens abroad. The States have no representatives in foreign countries, indeed, cannot have, because foreign governments do not recognize the States; they may know them, geographically, as a part of the United States, but do not recognize them as sovereignties. If a citizen of a State be imprisoned or oppressed in a

foreign land, he neither seeks redress through the legislature or governor of his State; but, as an American citizen, he seeks the protection of the United States, through its agents and representatives.

The United States, in the exercise of sovereign rights, have fixed the qualification of the representatives of the people and the States in Congress; and have fixed the qualification of most, if not all, the officers of the Federal Government, limiting that of President and Vice President to nativity.

The constitution of the United States is more than a compact; it is a government that enacts laws, executes its laws and administers its laws; and acts as directly and immediately upon the citizen, through its own agents, as does a State. (*President Jackson's Proclamation to the people of South Carolina, 1832.*)

We consider the State governments and national government, as they truly are, in the light of kindred systems, and parts of one whole, (82 No. *Federalist*.) The government of the United States forms part of the government of each State. These, the (States and national,) form one complete government. (*Pennsylvania vs. Cobbett, 3 Dallas, 473.*)

A case of great interest, originating out of the convention and nullification ordinance of 1832, came before the court of last resort in South Carolina, in which the three judges delivered separate opinions. I quote, with approval, from the opinion of two of the judges, being a majority of the court. O'NEAL, Judge, said: What is to be understood as the government of the people? The constitution of the State and the United States. They were the government of the people of the State of South Carolina, operating alike, in their respective spheres, silently but with irresistible authority. To these instruments, as the expressed will of the people in the shape of paramount law, every citizen and officer is bound to yield obedience. Every act of Congress which conflicts with the constitution of the United States is by it annulled; every act of the State legislature which conflicts with either the constitution of the United States or State is also void. They, (the two constitutions,) must together be sovereign, for together they constitute the entire will of the people, by which the government is to be administered in the State

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and United States. Each is sovereign in its particular department of rule, for each can overrule every thing which is contrary to its particular provisions. (*South Carolina ex relatione McCready, vs. Hunt, Col. 16 Reg. So. Car. Militia, 1 Hill, S. C. Rep. 494.*) That the government created by the Federal constitution is, strictly speaking, and in every sense, a government of the people; not of the whole people of the United States, as among themselves, but in this point of view, or the people of each State. As between it and foreign States, or nations, it is a government; for, within its prescribed constitutional limits, it acts upon the people, and enforces against them its laws, through its own judiciary, or that of each State. Within its own constitutional limits, *it is absolute and supreme.* (*Same page, 497.*)

JOHNSON, the President Judge of the court, said: The people have organized a government, clothed with all the powers that are necessary to protect the citizen in the enjoyment of all his rights, privileges and immunities. It is that government which does protect the citizen, and to that government the allegiance of the citizen is due. If that had been a simple government, intended for the State alone, and confided to the administration of agents appointed by the State, and responsible to the State alone, no proposition, not even a mathematical axiom, could be more certain than that the citizen would owe allegiance exclusively to that government. But many of the powers of government, and those of the greatest importance, have been confided by the people to the government of the United States, whose agents are not appointed by, or responsible to, the State, except in common with the other States; and to that government is confided the preservation of many of the dearest rights of the citizen; among these may be mentioned the guaranty of the constitution of the United States which secures to each State a republican form of government. The government of the United States has also the right to require of the citizen to contribute of his wealth to its support, and to serve in its armies. That government is, to all intents and purposes, as much the government of the people of South Carolina as the State govern-

ment. They have both received their sanction, and they have consented to be bound by them; and, if the conclusion of logic can be confided in, for the same reasons they owe allegiance to the State government they owe it to the government of the United States; sophistry may confuse the subject, but this must be the conclusion whenever the unerring test of truth shall be applied. (*Same*, 518-19.)

Thomas Jefferson, in his letter to Major John Cartwright, 5th June, 1824, said: (*vol. 4, page 396.*) With respect to the State and Federal governments, I do not think their relations correctly understood by foreigners. They generally suppose the former subordinate to the latter. But this is not the case. They are co-ordinate departments of one simple and integral whole. To the State governments are reserved all legislation and administration, in affairs which concern their own citizens only; and to the Federal government is given whatever concerns foreigners and citizens of other States; these functions alone being made federal. The one is the domestic, the other the foreign branch of the same government—neither having control of the other but within its own department.

In the case of *Talbot vs. Janson et al*, in the Supreme Court of the United States, (3 *Dallas*, 133, or 1 *Peter's Condensed Reports*, 68,) PATTERSON, Judge, and one of the framers of the United States constitution, said: If the act of Virginia affects Ballard's citizenship, so far as it respects that State, can it touch his citizenship so far as it regards the United States? Allegiance to a particular State is one thing, allegiance to the United States is another. Will it be said, that the renunciation of allegiance to the former implies or draws after it a renunciation of allegiance to the latter? The sovereignties are different; the allegiance is different; the right too may be different. Our situation being new, unavoidably creates new and intricate questions. *We have sovereignties moving within a sovereignty*; of course there is complexity and difficulty in the system, which requires a penetrating eye fully to explore, and steady and masterly hands to keep in unison and order.

Mr. Curtis, in his *History of the Constitution*, (2 *vol. page 379.*) says: The highly complex character of a system, in which

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the duties and rights of the citizens are thus governed by distinct sovereignties, would seem to render the administration of the central power—surrounded as it is by jealous and vigilant local governments—an exceedingly difficult and delicate task. Its situation is without an exact parallel in any other country in the world. But it possesses the means which no government of a purely federal character has ever enjoyed, of an exact determination by itself of its own powers; because every conflict between its authority and the authority of a State may be made a judicial question, and, as such, is to be solved by the judicial department of the nation.

In *Commonwealth vs. Morrison et al.*, (2 A. K. Mar., 77.) which involved the power of the State to tax the capital stock of the United States Bank, used in Kentucky, Judge ROWAN, in delivering the opinion of the court, and in reference to the necessity, nature, and objects of the federal government, said, that the patriots and sages of America "viewed, in the thirteen existing republics, the materials furnished, as they fondly hoped by celestial agency, for a great national republic of interminable duration. While they saw, in the surrender made by the States of a portion of their sovereignty, a deposit formed, competent to all the purposes of national sovereignty, they saw, also, that the powers composing the national stock were enumerated, specified and defined; and they saw the retention by each State of so much sovereign power as left it competent to all the purposes of sovereignty not incompatible with its associated and intervolved positions." Also, "It may, therefore, be said, with equal truth, that the constitution was formed by the *people* or by the *States*; and, using either mode of expression, the States, having been at that time plenary sovereigns, must be considered now as less so, by the destitution of so much power, only, as was expressly, or by fair implication, delegated to the nation by that instrument." Again, "The powers conceded by the States to the nation were sovereign; but they did not concede all the sovereign power which they possessed, nor did what they retained become less sovereign by the retention; neither was reduced or degraded by the process."

In *McCulloch vs. Maryland*, before the Supreme Court of the United States, (4 *Wheaton*, 116,) Chief Justice MARSHALL, in delivering the opinion of the court, said: "In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

We have, not only the authority of the most august judicial tribunals and their solemn adjudications, the teachings of the fathers of our republic and those great men whose names adorn our history, but the constitution of the United States, by its own provisions, plainly shows us that it is invested with sovereign powers of the greatest magnitude. Among which may be enumerated the power to lay and collect taxes, duties, impost, and excise; to provide for the common defence and general welfare of the United States; to regulate commerce with foreign nations and among the several States, and with the Indian tribes; to coin money, regulate the value thereof, and of foreign coin; and fix the standard of weights and measures; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies; to declare war, and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for the calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion; to provide for arming, organizing, and disciplining the militia; to make treaties with foreign nations, and to punish treason. It has power to make war without the consent of the States, nay, against the earnest protest of a State; yet, when the war is once declared, it involves the dissenting as well as the assenting States; and, when it concludes peace, however injurious to the feelings of the State or humiliating to its pride, the sword must fall from its grasp. But few, if any, of these high prerogatives of sovereignty may the States exercise.

Self-government is said to be one of the most striking features of a nation. Does not the United States enjoy this at-

tribute, both as to foreign and domestic concerns, in a far higher degree than any one of the States? Does it not represent and control, legislate for at home, and negotiate for abroad, the States, and the people of the States, whilst the States, nor the people of the States separately, can exercise corresponding power as to the Union? It is impossible that a government should be invested with these prodigious powers of self government and yet have no sovereignty.

This government is not only sovereign, but it is supreme, and designed to be perpetual.

In addition to many reasons already given, which apply as well to the supremacy and perpetuity as to the sovereignty of the United States, it may be said to be invested with national powers at home and international powers abroad; subordinate to no other government; supreme over all within its limits—which are among the highest characteristics of superior compared to inferior sovereignties.

Again. No State can amend her constitution so as to conflict with the constitution of the United States; but, by the 5th article of the United States constitution, it may be amended, whenever two-thirds of both houses of Congress shall propose the amendment, or, on application of the legislatures of two-thirds of the States, Congress shall call a convention—which amendments, in either case, shall be valid when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof; and this, notwithstanding such amendments might be in conflict with some of the provisions of the State constitutions. And thus a State constitution might be *pro tanto* repealed; and this is the only legal and constitutional manner that a State constitution can in any way be altered or disregarded by the United States. Yet a State cannot amend its constitution so as to conflict with the United States constitution, as such amendment would be a nullity because in conflict with the supreme law of the land, and specifically prohibited by the 2d section, 6th article United States constitution. Again, to secure the faithful observance of this constitution in all time, it is provided by the 3d section, 6th article, that, not only the Senators and Representatives in Con-

gress, but the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation, to support this constitution. And, that there should be an ultimate tribunal in which all controversies between the United States and a State or the citizen of a State, or between States, should be adjudicated and settled, and that the systems of national and State government might be made to work harmoniously as one whole, it was agreed by the States, in sections 1 and 2, article 3, constitution of the United States, to submit to the jurisdiction of the Supreme Court of the United States all controversies, in law or equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to all controversies to which the United States shall be a party; to controversies between two or more States. And, finally, it is declared by article 6, of said constitution, "That this constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.*" And it is a remarkable circumstance, that this provision was originally proposed by a very earnest advocate of the rights of the States—Luther Martin. (*Curtis' His. Con.*, 2 vol. page 374; also, 2 vol. *Madison Papers*, 906–915.)

A very imposing case, growing out of the act of the Virginia legislature of 1777, to sequester British property, which contained this provision: "That it should be lawful for any citizen of Virginia, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he should think fit, into the loan office, taking there out a certificate for the same, in the name of the creditor, with an indorsement, under the hand of the commissioner of the said office, expressing the name of the payer; and shall deliver such certificate to the Governor and the council, whose receipt shall discharge him

from so much of the debt," and the treaty of peace between the United States and Great Britain of 1783, came before the Supreme Court of the United States at its February term, 1796. The treaty, in the 4th article, contained this clause: "It is agreed that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted."

The defendant in error, having paid into the Virginia loan office, and having obtained a discharge, was sued in the United States court for the district of Virginia. It was universally conceded that, as the States had not surrendered the right of confiscation and sequestration by the articles of confederation, that they still possessed this as a sovereign right; but it was contended, that, in making the treaty of peace, they had agreed to surrender the same, and that afterwards, when they made the constitution of the United States, they had again agreed to the surrender of such right and the repeal of their laws enforcing the same.

CHASE, Justice, in his opinion, says: "If doubts could exist before the establishment of the present national government, they must be entirely removed by the 6th article of the constitution. There can be no limitation on the power of the people of the United States. By their authority the State constitutions were made, and by their authority the constitution of the United States was established; and they had power to change or abolish the State constitutions or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State legislature can stand in its way. If the constitution of a State, which is the fundamental law of the State, and paramount to its legislature, must give way to a treaty, and fall before it, can it be questioned whether the less power, an act of the State legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty, made by authority of the United States, shall be superior to the constitution and laws of any individual State; and their

will alone is to decide. Four things are apparent on a view of this sixth article of the national constitution.

1. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783.

2. That the constitution or laws of any of the States, so far as either of them shall be found contrary to that treaty, are, by force of the said article, prostrate before the treaty.

3. That, consequently, the treaty of 1783 has superior power to the legislature of any State, because no legislature of any State has any kind of power over the constitution, which was its creator.

4. That it is the declared duty of the State judges to determine any constitution or laws of any State, contrary to that treaty, or any other, made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct." (*Ware, admr. of Jones, vs. Hyllon, et al*, 3 *Dallas*, 199, or 1 *Peters, Cond. Rep.*, 112-13.) CUSHING, Justice, says: "To effect the object intended, there is no want of proper and strong language; there is no want of power, the treaty being sanctioned as the supreme law by the constitution of the United States, which nobody pretends to deny to be paramount and controlling to all State laws, and even State constitutions, wheresoever they interfere or disagree." (*Same case*, 1 *Peters Cond. Rep.* p. 131.)

Here was a strong case. The State had exercised an undoubted sovereign right, which she then possessed—her citizen had been discharged from his liability to the British creditor—yet the supreme court held that by virtue of the treaty of peace and the constitution of the United States, both made after the extinguishment of the debt, that the right of the creditor, and the liability of the debtor, revived, and this even in contravention of State laws or State constitutions.

The original articles of confederation and perpetual union had not provided for an executive officer to execute the laws, nor for a judiciary to administer them; and, so meagre were the powers conferred upon Congress, that Chief Justice TANEY truly said, in the *Dred Scott* case, that Congress was little

more than an assemblage of ambassadors representing different sovereignties, without the power of executing their determinations.

Experience soon developed the imperious necessity of having a government capable of enacting, executing, and administering its own laws through its own agencies. The preamble and enacting clause to the United States constitution announced that such a government was intended to be called into existence. "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and *secure the blessings of liberty to ourselves and our posterity*, do ordain and establish this constitution for the United States "

Pursuant to a unanimous resolution of the convention, Washington, as the president of the convention, addressed a letter to the president of Congress, laying before that body the constitution, in which he says: "It is obviously impracticable, in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the objects to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several States as to their situation and extent, habits, and particular interests. In all our deliberations on this subject we kept steadily in view that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence." (*Federalist*, page 491.)

The framers of the constitution resorted to an enactment of that instrument by the people of the United States, and employed language which speaks in their name, for the express purpose, among other things, of bringing into action a na-

tional authority, on certain subjects. The organs of the general government, therefore, are not the agents of the separate will of the people of each State, for certain specified purposes, as its State government is the agent of their separate will for all other purposes; but they are the agents of the will of a collective people, of which the inhabitants of a State are only a part. That the will of the whole should not be defeated by the will of a part, was a purpose of the supremacy assigned to the constitution of the United States; and that the rights and liberties of each part not subject to the will of the whole, should not be invaded, was a purpose of the careful enumeration of the objects to which that supremacy was extended. (*Curtis' His. Con.*, 2 vol. 381.)

In order to preserve the whole, it must preserve each part. Therefore it is provided by the 4th section, 5th article, the United States shall guarantee to every State in the Union a republican form of government, and shall protect each State against invasion.

Here, then, is an august government, with power to make war and conclude peace; repel invasion and suppress insurrection; with provisions for the amendment of its own constitution, that the imperfections which experience may point out may be remedied, and that it should, from time to time, be so adapted to the progress of the age, its wants, and necessities, as to accomplish the great purposes declared in the preamble. And, that none of its parts should be perverted, guaranteeing to each State a republican form of government, which is also a guaranty that it, too, shall remain a republic. With a Supreme Court, independent, in the very nature of the tenure of office of the judges, of popular clamor and sectional prejudices, as a great and final forum to adjudicate all matters of law or equity between the United States and a State, or between States.

And, only by its consent, can new States be formed and admitted into the Union, out of all that vast territory extending, at the time of its formation, from the Ohio river to the lakes, and, by subsequent acquisition, from the Mississippi river to the Pacific ocean; and, until this consent can be obtained, the

people of these territories remain mere dependencies; the government appointing their executive and judicial officers, sometimes even their legislative ones, and sometimes requiring the assent of the national legislature to their local enactments before they become operative.

Then, whether we take the judicial expoundings, regard the current history of the day, or the teachings of the great founders of the republic, or confine the investigation alone to the principles, powers and objects of the government, as defined in the constitution, it is equally plain that sovereignty, supremacy, and perpetuity, are fundamental principles of the constitution; and that neither the destruction of the United States constitution, or any of the States, was ever contemplated by the constitution or its framers. Yet this great central government, with all its vast attributes of sovereignty, supremacy and perpetuity, is a government of limited powers and specified grants, and can exercise no authority unless explicitly granted or necessarily implied therefrom.

It follows, that none but revolutionary action can by any possibility deny its sovereignty, reject its supremacy, or attempt the destruction of its perpetuity. Whether it be through the agency of revolutionary conventions, as by some of the seceded States, or by act of the legislature as in others, all are equally unconstitutional, revolutionary, and acts of hostility towards the Federal government; are simply efficient means by which the organizations and government of the States are seized and perverted to revolutionary purposes, compelling the citizen to a hostile attitude against the local government by which he is immediately surrounded, else driving him from his allegiance to the United States and forcing him to rebel against its constitution and legitimate authority. The usurpation and perversion of the State governments thus became an irresistible engine in the hands of revolutionists to compel into submission thousands upon thousands of their citizens, contrary to their most sacred convictions.

The State governments, having thus been seized, the civil power of the United States was either expelled or broken down, but the United States still held military power and had

possession of many forts within such States. To expel this power required actual force, actual hostility, actual war; and, for this emergency, the revolutionists began an immediate preparation, by organizing for themselves a central government, raising and equipping an army, and providing for a navy, and in due time assaulted and expelled the United States garrison from Fort Sumpter. Thus civil war was actually inaugurated among the American people, a hostile power, called the Confederate States of America, was set up, and actually engaged in war with the United States. This hostile power, having no justification in the constitution of the United States, all those who espoused its cause by going into its service, adhering to it, by giving it aid and comfort, became rebels—traitors—violated their allegiance to the United States constitution, and committed treason against it.

As these were all rebels and traitors,—I use these terms in their legal signification, and not as mere terms of opprobrium,—what punishment can be constitutionally inflicted on them, for this, the greatest crime against civil society?

A preliminary question should be here disposed of. It has been urged, with zeal and earnestness, that the limitation found in the latter clause of section 3, article 3, of the United States constitution, that “no attainder of treason shall work corruption of blood or *forfeiture* except during the life of the person attainted,” applies only to real estate; and that, as to all other estate, Congress has unlimited power.

To understand correctly the meaning of the term “*forfeiture*,” as used in the constitution, it will be necessary to examine how the laws of England stood at the time of the separation of the United States from her, and, to some extent, the history of the legislation of the States before the treaty of peace of 1783.

The consequences of attainder are forfeiture and corruption of blood. (4 *Blk. Com.*, 381.) Forfeiture is two fold; of real and personal estate. *First*, as to real estate; by attainder in high treason a man forfeits to the king all his lands and tenements of inheritance, to be forever vested in the crown. This forfeiture relates backward to the time of the treason committed, so as to avoid all intermediate sales and incumbrances.

But, though after attainder, the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and, therefore, if a traitor dies before judgment pronounced, or is hanged by martial law, it works no forfeiture of his lands, for he never was attainted of treason. But, if the chief justice of the King's Bench, (the supreme coroner of all England.) in person, upon view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited. (*Same page, 381.*) Again. There is a remarkable difference or two between the forfeiture of lands and goods and chattels. 1. Lands are forfeited upon attainder, and not before; goods and chattels are forfeited by conviction, (verdict of the jury.) Because in many cases, where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given. 2. In outlawry for treason or felony, lands are forfeited only by the judgment; but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed.

The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bona fide* sell any of his chattels for the sustenance of himself and family, between the fact and conviction. (4 *Blk. Com.*, 387.)

Notwithstanding there were differences between the forfeiture of lands and personal property, yet the forfeiture of both followed from attainder; both forfeiture and corruption of blood were consequences of attainder, but forfeiture was not a consequence of the corruption of blood, nor was corruption of blood a consequence of forfeiture. And, although there were more safe-guards thrown around real estate, by the English law, than personal estate, yet this cannot be a sufficient reason for exempting this class of property from the constitutional protection.

The great expounders of the constitution, in the earlier days of the republic, when neither passions, prejudices nor partialities had been excited by a great civil commotion, all so understood its provisions.

Mr. Madison, in 43d number of Federalist, says: As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it; but as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, *from extending the consequences of guilt beyond the person of its author.*

Blackstone, (4 vol. p. 380,) assigns the reasons of the common law for its extreme punishment as follows: When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate and inseparable consequence from the common law is attainder. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane of human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened. And the consequences, forfeiture and corruption of blood.

Judge STORY, commenting upon this 3d section, 3d article of the constitution, and referring to the reasons of the common law for its harsh punishment, says: But this view of the subject is wholly unsatisfactory. It looks only to the offender himself, and is regardless of his innocent posterity. It really operates a posthumous punishment upon them; and compels them to bear, not only the disgrace naturally attendant upon such flagitious crimes, but takes from them the common rights and privileges enjoyed by all other citizens, when they are wholly innocent, and however remote they may be in their

lineage from the first offender. It surely is enough for society to take the life of the offender, as a just punishment of his crime, without taking from his offspring and relatives that *property*, which may be the only means of saving them from poverty and ruin. It is bad policy, too, for it cuts off all attachment which these unfortunate victims might otherwise feel for their own government, and prepares them to engage in other services, by which the supposed injuries may be redressed, or their hereditary hatred gratified. Upon these and similar grounds, it may be presumed, that the clause was first introduced into the original draft of the constitution, and, after some amendments, it was adopted without any apparent resistance. The history of other countries abundantly proves that one of the strong incentives to prosecute offences, as treason, has been the chance of sharing in the plunder of the victims. Rapacity has been thus stimulated to exert itself in the service of the most corrupt tyranny; any tyranny has been thus furnished with new opportunities of indulging its malignity and revenge; of gratifying its envy of the rich, and good; and of increasing its means to reward favorites, and secure retainers for the worst deeds. (*Story's Com. Const.*, 3 volume, section 1235.)

That this limitation on the power of forfeiture applies to real estate, all concede, yet this act of Congress attempted to apply forfeiture absolutely to it. True, that, to save the act from executive veto, Congress passed a joint resolution declaring, among other things, that no punishment or procedure under said act should be construed so as to work a forfeiture of real estate of the offender beyond his natural life.

If the great object of the limitation found in this section 3, article 3, of the constitution, be to limit the punishment to the offender, and to secure his offspring and relatives from punishment because of his offenses, it must necessarily embrace personal as well as real estate. In many instances, in this commercial country, all that a man possesses is personalty; in a great majority, a very large, if not the larger portion, of each man's estate is personalty; and perhaps all the States without exception provide as definitely who shall take the personalty

of intestates as who shall take the realty; and it is as much a punishment to take from those entitled to the personal estate as to take a like amount in value from those entitled to the real estate.

There is nothing in the language of the constitution to justify the exemption of real, more than personal estate; nothing that leaves personal estate less protected than real estate; nothing in the history of the times when the constitution was made to justify the belief that any such discrimination was intended; nothing in the cotemporaneous expoundings of the constitution which justifies such discriminations. The limitation is "that no attainder of treason shall work corruption of blood or *forfeiture*, except during the life of the person attainted." Is it not most apparent that, had the framers of the constitution intended to limit this power of forfeiture to lands, they would have added the words, of real estate, after "forfeiture?" The language would then have been clear and explicit, that "no attainder of treason shall work corruption of blood or forfeiture of real estate, except during the life of the person attainted;" it would then have required no metaphysical reasoning or attenuated argument to so construe it. The term "*forfeiture*" is sufficiently comprehensive to embrace every thing which may be possessed and be the subject of forfeiture; and, as the qualifying words "of real estate" are not connected with it, nor in the section, it was evidently intended to embrace, does actually embrace, and must necessarily be construed to embrace, personal as well as real estate, and, consequently, the same constitutional restriction applied to real estate must be applied to personal estate. The purposes assigned by the common law for the forfeiture of personalty to the king, "for the trouble and charge he has been at in holding courts and bringing offenders to justice," (4 *Bac. Abridg.*, title *Forfeiture*, letter B, page 340,) are alike wholly unsatisfactory and at war with the nature of our government. The whole genius and theory of our constitution and laws are to punish the offender for the offense, and thereby deter the vicious from the commission of crime; whether this be by fine, imprisonment, forfeiture or death, and not to compensate the

government for its trouble and expense in holding courts, though fines are often-times thus appropriated.

Why it is not quite as easy and rational to construe a conspiracy to make war, a treason, under the section of the constitution which declares that treason shall consist only in levying war against the United States, or in adhering to their enemies by giving them aid and comfort, as it is to construe the limitation that no attainder of treason shall work a forfeiture except for the life of the person attainted, to embrace only a part of his estate, is not perceived. Give these constructions, and then, by some other ingenious invention, construe away the requirement of the testimony of two witnesses to each overt act, and we shall have nearly opened the broad door of the common law to constructive treasons and extreme punishments, not only of the offender, but of all those who are in any way to inherit or receive from him. Yet it has uniformly been determined that a conspiracy to make war was no treason; that the war must actually be levied before a treason could be committed. (*See 3 Story's Com. on Const., sec. 1794, page 669; also, United States vs. Burr, 4 Cranch, 469.*)

Georgia, Maryland, Virginia, North Carolina and other States, had passed confiscation laws, embracing every character of estate which their citizens owned who adhered to the British crown; and several of the States had enacted laws confiscating and sequestrating the estates of British subjects, found within their jurisdiction, who had never been citizens of the State. Great Britain, too, had her confiscation laws. Much vexatious litigation had sprung out of these mutual confiscation laws, and the treaty of 1783; the wreck of many fortunes, the ruin of many men, their families and offspring, were to be seen scattered throughout the land. The oppression and injustice, the strife and hate, growing out of the confiscations of the Revolution, were fresh in the memory of the framers of the constitution; and, with all these in their recollection, the limitation on the power of forfeiture was adopted; and clearly embraces both real and personal estate.

This act of Congress, approved July 17, 1862, must, then, be tested by this constitutional standard. By the 5th section of

said act it is enacted, "That to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, and credits and effects of the persons hereinafter named in this section, and apply and use the same and the proceeds thereof for the support of the army of the United States." Although this section appropriates the proceeds of the property to be seized and condemned, to the support of the army, and for the purpose of suppressing the rebellion; yet, by its own provision, the title of the act, the previous and subsequent sections of the act. it is apparent that it was intended as a punishment—a forfeiture of rebel property for their treasonable acts.

The intent never to pay for property, thus authorized to be seized, is so obvious, and the language of the act is so inappropriate for such a purpose, that it cannot be conceived that it was intended as an exercise of the right of eminent domain—the right of the government to resume the estates of the citizen for public use—and would be such a palpable violation of the last clause of article 5, amendments to the constitution, which provides, "nor shall private property be taken for public use without just compensation," that it would be doing great injustice to the intelligence of the Congress that enacted it, as well as great violence to the language of the act, so to construe it. It must, then, be what the title of the act, and the language of the act, purports to be, a forfeiture—a punishment for crime, to-wit, for engaging in the rebellion or aiding those in rebellion; or, in other words, for committing treason.

It is, then, a punishment for crime—treason—to be established before a court of the United States; not upon an indictment, arraignment, and trial by his peers, confronted by the witnesses, and the testimony of two witnesses to each overt act, the unanimous verdict of twelve impartial persons, which may be selected after the right of challenge by the accused shall have been exercised or waived, and the judgment of the court pronouncing sentence upon the verdict of guilty, after the accused shall be heard by himself and counsel; all of which are understood to be rights secured by the constitution; but it

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is by an *ex parte* proceeding *in rem*, in the absence of the party and without his knowledge; and, though the trial may be by jury, it is to be selected without the exercise of the right of challenge, without the testimony of two witnesses to each overt act, without being confronted by the witnesses, without being heard by himself or counsel; the accused is convicted, stripped of his estate, impoverished, his innocent offspring ruined, with the traitor's seal placed upon him, attaching disgrace to his posterity, by the solemn adjudication of the court.

After being thus punished by a proceeding *in rem* he may return or be captured, indicted, put upon his trial, convicted, and sentence of death pronounced by the court. Or, he may be acquitted after a fair trial, by an impartial jury, being confronted by the witnesses, and the testimony of two witnesses to each overt act being required, and having been heard by himself and counsel; and thus, by the most solemn act and highest evidence known to the law, such as shall never be gainsayed by any subsequent proceedings, he may stand acquitted, his innocence of crime manifested. Still, by another proceeding *in rem*, he finds himself convicted, his property confiscated, himself and offspring ruined, for the very crime he now stands acquitted of committing.

To prevent such inconsistencies and sad injustice, among other securities, article 5 of the constitution provides, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; *nor be deprived of life, liberty, or property without due process of law;*" and, if the intent to make this of universal application could be made more imposing by anything, than by the import of the terms used, this thing is to be found in the exceptions contained in the article, and must apply to all cases not within the exceptions.

Let us pause a moment to consider what is meant in the constitution, "by due process of law," without which *no person* is to be deprived of *life, liberty, or property*. Lord Coke, (2 *Inst.*, 50,) gives, as the settled construction and true meaning of the

words "or by the law of the land," in *Magna Charta*, "without due process of law, so that no man be taken, imprisoned, or put out of his free-hold, without due process of law; that is, by indictment of good and lawful men." Judge Kent, in his 24th lecture, (1 vol. *Com.*, 8 edition, 612,) says: "It may be received, as a proposition universally understood and acknowledged throughout this country, that no person can be taken or imprisoned; or disseized of his free-hold or estate; or exiled or condemned; or deprived of life, liberty, or property, unless by the law of the land, or judgment of his peers. The words, by the law of the land, as used originally in *Magna Charta*, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men. The better and larger definition of *due process of law* is, that it means law in its regular course of administration, through courts of justice. Judge Story, in his Commentaries on the Constitution, (vol. 3, sec. 1783, page 661.) says: "The other part of the clause is but an enlargement of the language of *Magna Charta*, *nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terræ*, neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. Lord Coke says these latter words, by the law of the land, mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause, in effect, affirms the right of trial according to the process and proceedings of the common law."

In *Ely vs. Thompson*, (3 A. K. Mar., 74,) in commenting on a corresponding clause in our State constitution, Judge Mills, who delivered the opinion of the court, said: "It is evident this section contemplated more kinds of public or criminal prosecutions, than those which are carried on by indictment or information. In all it secures the right of being heard; of obtaining the nature and cause of the accusation; of confronting the witnesses and disproving their evidence; in those by indictment or information, a trial by jury is secured. Determining what is the meaning of and included in the words 'crimi-

nal prosecutions' in this section, measurably controls the whole section. They evidently mean any prosecution carried on in the name of the Commonwealth for any offense or crime against society. The word criminal is used as opposed to civil suits or actions. The one includes all suits of the government, the end and design of which is punishment of the accused; the other embraces all actions for individual redress."

The essential provisions of the clause of the State constitution are so identical with that of the United States, that these remarks apply with equal force to the latter; and, notwithstanding the State constitution may contemplate more kinds of criminal prosecutions than that of the United States, yet the great and essential requisites of a trial upon indictment are indispensable to a conviction.

It is further declared, in article 6, amendments to the constitution, that, "in all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." So essential to the security and liberty of the citizen were these safe-guards deemed, that these explicit amendments were sought and obtained to the constitution.

Are these solemn declarations of rights, these great safe-guards to the security of the citizen, to be swept away by the furor of this rebellion? Are not the loyal citizens interested in the preservation of these great bulwarks of their liberty, for themselves and posterity? These proceedings may to-day be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice and tyranny to themselves or their posterity. If these are as valuable as we have been taught by our fathers to regard them, they are worth vastly more to us and our posterity than any amount of property the rebels may own, though it were a hundred fold more than it is, and though it were both desirable and certain

that we should secure all they possess. Or, if viewed in the light of punishment alone, would it not be the height of madness and folly to throw away our own shield and safe-guard, revolutionize our government, endanger our liberties, in order to punish our enemies?

The framers of the constitution, having closed the door against legislative attainder, both by the national and State legislatures, first by section 9, sub-section 3, article 1, United States Constitution, which provides that "*no bill of attainder or ex post facto law shall be passed*" by Congress—second, by section 10, sub-section 1, same article, which, among other things, provides that no State shall "*pass any bill of attainder ex post facto law,*" &c., it only remained to place the proper restriction on judicial attainder for treason, to get rid of the gross injustice, oppressions and tyranny of the common law, British statutes, and the machinery of the English government, often invoked to crush and ruin those who had become obnoxious to the reigning dynasty, as well as the unjust and oppressive acts of the American States, passed under the deep and excited resentments of the Revolution. And this was most effectually done, by this section 3, article 3, declaring in what treason should consist, and limiting the consequences of attainder for treason to forfeiture for the life of the offender, as to property.

In *Gaines vs. Buford*, (1 *Dana*, 509,) Judge NICHOLAS, one of Kentucky's ablest jurists, has well said: "Bills of attainder are said by Woodeson, in his lecture, to be acts of supreme power, pronouncing capital sentences where the legislature assumes judicial magistracy; and bills of pains and penalties, those which inflict milder punishments. But it is believed that *bills of attainder* is a generic term, comprehending both descriptions of acts; such, at least, is believed to be its true signification as used in our constitutions. Thus, it is said by the Supreme Court of the United States, in *Fletcher vs. Peck*, (6 *Cranch*, 138,) 'a bill of attainder may affect the life of an individual or may confiscate his property, or both.' So, also, it is said by Judge Tucker, in his edition of Blackstone, (vol. 1, p. 292,) 'bills of attainder are legislative acts, passed for the

special purpose of attaining particular individuals of treason or felony, or inflicting pains and penalties beyond or contrary to the common law.' That the term should be received in the large sense thus given to it, is consonant with the true republican character of our institutions. A condemnatory act of the legislature, inflicting upon an individual or class of individuals pains and penalties, is as much within the reason of the prohibition as if it inflicted capital punishment. They are equally hostile to the principles of civil liberty and the spirit of our constitutions. They are equally engines of tyranny and oppression, and equally unsuited to the government of a free people." Again, he says: "Bills of attainder have generally designated their victims by name; but they may do it, also, by classes, or by general description fitting a multitude of persons. Either mode is equally liable to moral and constitutional censure. They have generally been applied to punish offenses already committed; but they have been, and may be, applied to the punishment of those thereafter to be committed, or for criminal omissions thereafter occurring."

As the constitution of the United States is a part of the government of each State, so is the constitution of each State a part of the government of the United States; it takes the two to make a perfect government, whether this be said of the one or the other. All the sovereignty, supremacy, and perpetuity of the United States is found in the express and implied grants from the States and the people of the States, as specified in the constitution; this supreme government has, as the foundation for its superstructure, the States. All the sovereign powers not delegated to the United States, nor prohibited to the States, are yet reserved to the States or people, with the supreme right to legislate on, and control all the domestic affairs of the people of the respective States, which are not confided by the constitution to the Federal government. The constitution of each State, within its sphere, and not in conflict with the constitution of the United States, is as sovereign, supreme, and designed to be as perpetual, as the constitution of the United States. The States have not only the written guaranty, as found in the United States constitution, that they shall have

a republican form of government and be protected against invasion, but, if the United States constitution would preserve its own perpetuity, it must preserve the sovereignty, supremacy and perpetuity of each State, within its proper sphere, and when it shall fail to do this it will have been revolutionized.

It is then, constitutionally, as impossible for the United States to disregard the rights of the States, their constitutions and laws, not in conflict with the constitution of the United States and its laws, made in pursuance thereof,—and thus destroy a State,—as it is for a State, constitutionally, to secede from the Union and disregard the constitution and laws of the United States.

As the constitution of the United States never contemplated its own destruction, so it never contemplated the destruction of a State constitution. "The States are, in that instrument, (constitution of United States,) intertwined with the national government, as essential parts thereof. They could not be considered competent to subserve the purposes of their destination, as constituent parts of that government, in any other than a sovereign character. The Senate, the most important pillar in the fabric of that government, is composed entirely of State materials. It is, in the government of the nation, the representative of the sovereignty of the States, and was designed not only to check and control popular furors, executive aberrations and judicial delinquencies, but to infuse into executive agency its monitory influence." (*Commonwealth vs. Morrison*, 2 A. K. Mar., 87-8.)

Nor can there be any conflict between the States and United States government, growing out of this doctrine; for, as has been said by the Supreme Court, in Chief Justice Marshall's opinion in *McCulloch vs. Maryland*, before recited: "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those measures which are employed by Congress to carry into effect powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to

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a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possesses, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. * * * We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right of one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve."

This same doctrine was again brought under review, at the December term, 1862, of the Supreme Court of the United States, in the *Bank of Commerce vs. New York City*, and unanimously adhered to—opinion by Justice Nelson.

It will be remarked, that for convenience, and for the want of a better mode of expressing the meaning, courts and others often speak of the State governments and United States government, as separate and distinct governments; but this is generally done in reference to the separate powers which belong exclusively to the one, or the other, and not as in the least militating against the principle, that for many purposes they are essentially one and the same government, in each State.

That the United States is sovereign and supreme, within its constitutional sphere, and that the States are sovereign and supreme within their proper spheres, and that both are parts of the same sovereign government, for the same people, and that there is a line of demarcation, by which to determine the proper jurisdiction and supremacy of each, and that where the supremacy of the one begins, the other ends, or, in other words, where the State supremacy ends, the Federal supremacy begins, have been affirmed in one way, and another, by an unbroken current of decisions of the Supreme Court of the United States from the case of *Ware's adm'r. vs. Hylton*, 1796, (3

Dallas,) down through *Osbourne, &c. vs. Bank United States*, 1824, (9 *Wheaton*,) *Brown vs. Maryland*, 1827, (12 *Wheaton*,) *Weston vs. Charleston City*, 1829, (2 *Peters*,) *Providence Bank vs. Billings & Pittman*, 1830, (4 *Peters*,) *Worcester vs. Georgia*, 1832, (6 *Peters*,) *Rhode Island vs. Massachusetts*, 1838, (12 *Peters*,) *United States vs. Graceatt*, 1840, (14 *Peters*,) *Dobbins vs. Com'r. Erie Co., Pa.*, 1842, (16 *Peters*,) *West River Bridge Co. vs. Batteboro*, 1848, (6 *Howard*,) *Smith vs. Health Com'r. of N. Y.*, 1849, (7 *Howard*,) to the cases before recited, both from the Supreme Court of the United States, and the States.

Ample powers, to enforce the observance of the constitution and laws of the United States, by each State, and the people of the State, are conferred by the constitution upon its legislative, executive and judicial departments; and, by peaceable means, unless in cases of insurrection, when ample war powers to suppress the same are conferred; but this is the full measure of the powers conferred on the government. Beyond this it cannot go. It has no constitutional power, through any or all of these agencies, to prostrate a sovereign State, its constitution and laws. We know, as a historical fact, that the convention which framed the constitution refused to confer upon the Federal government the power to make war on a State; experience has demonstrated the wisdom of this refusal.

Such a thing as a State constitution becoming forfeited by reason of crime, is a constitutional impossibility. Conspirators and rebels, as has been shown, may get control of the State organization, and thereby control the people; but all such acts are usurpations and nullities, and as much in conflict with the State constitution and government as in conflict with the United States constitution and government. And, when the organized power of the rebellion shall be broken down, then the constitution and laws of the United States again become operative in the rebellious States; and, as a part of the government and constitution of the United States, the constitution and laws of the respective States, which were so recognized by the United States before the rebels usurped the State government, also become operative.

The Federal government was bound by duty and constitutional obligation to protect the people of the States against domestic violence and revolution, and every loyal man in such States had a right to rely on the government for a discharge of those duties; but, either for a want of ability or inclination, it failed, until a rebellion of gigantic proportions was organized. After being thus derelict, it would indeed be a monstrous immorality for the government itself to persist in a disregard and violation of those constitutions and laws, instead of discharging its most solemn constitutional obligations.

The Federal government, through all of its departments, has acknowledged this obligation to the loyal men of the seceded States, by its acts, many of which are wholly inconsistent with the idea that it regards them or would treat them as alien enemies because of the unfortunate condition of their States. The Supreme Court still recognizes the venerable Catron, of Tennessee, and Judge Wayne, of Georgia, as part of its body. Judge Lane, a citizen of Alabama, is still recognized as the Judge of the United States District Court for that State. Andrew Johnson, a Senator for, and citizen of Tennessee, was permitted to retain his seat in the Senate long after the separation act of the Tennessee Legislature. Horace Maynard, another citizen, was permitted to retain his seat in the House of Representatives. Emerson Etheridge, another citizen, was elected Clerk of the House of Representatives, and held the full term all after the separation act. Judge Trigg, another citizen of Tennessee, is now the United States District Judge for that State, by executive appointment long after said separation act. Andrew Johnson is now Brigadier General, and military Governor of Tennessee. General Carter, a citizen of Tennessee, holds a commission as Brigadier, and is in command of a large force of commissioned officers, privates, &c., all Tennesseans—and all these officers by executive appointment since said separation act.

Surely the Supreme Court would not recognize and permit an alien enemy to sit as part of its constituent body, to adjudicate the graveest questions, in which their own government, or its people, would be vitally interested.

Congress would scarcely let alien enemies sit and vote with them, on measures of the most momentous character, involving the destiny of this government, and theirs.

The chief executive officer of the nation would scarcely be so unmindful of his official oath and duty, as to appoint to stations of the most important trust, both civil and military, alien enemies.

There is but one theory upon which these various actions can be sustained; and that is, that all the secession ordinances and legislative acts are unconstitutional and wholly void, and do not in any wise disturb the relations of the citizen to the Federal government, who still recognizes his allegiance thereto, and can by no possibility forfeit any rights, of person or property, of his.

It would, indeed, be a strange inconsistency in the government to recognize the officer, and his official conduct, and pay him his salary, and then turn about and take his property, or debar him of his rights of person or property, because of his residence in a seceded State. The loyal citizens of these States, unquestionably, still retain all their original rights, subject however, for the time being, to the provisions of the non-intercourse laws and regulations of the Treasury Department, made in pursuance thereof; and, to a great national policy growing out of the necessities of the present situation, and such as is calculated to prevent the enemy from being benefited.

This act of Congress, not only, in contravention of the United States constitution, forfeits absolutely the personal estate of the rebels, but also declares his slaves free, in contravention of the legitimate constitution and laws of the seceded States, and also in contravention of the constitution and laws of the loyal States; thus perpetrating the double violation of the United States constitution and State constitutions, and destroying an essential and integral part of its own government.

Is it possible that loyal States have forfeited any rights by this rebellion? Can it be that their constitution and laws, which existed previous to the rebellion, and were respected and observed by the Federal government, are any the less ob-

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ligatory and sacred now than then? Is it possible that the loyal citizens, of the loyal States, have lost the right to enact their own laws, not inconsistent with the constitution of the United States and laws enacted in pursuance therewith, and have those laws observed by that government for which they have so freely poured out their blood and treasure? These are great and essential principles in our system of free government that should not be thrown away, merely for the gratification of punishing rebels; and, when once lost, may never be regained.

Can this act of Congress, so violative both of the United States and State constitutions, be upheld, either by the laws of nations, or by the laws and usages of war, as recognized by modern civilized and christian nations?

Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States, in the case of the *United States vs. Percheman*, (7 Peters, 86,) says: "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relations to their sovereign are dissolved; but their relations to each other, and their rights of property, remain undisturbed."

Another of America's greatest publicists, Mr. Wheaton, says: "But, by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempt from the general operations of war. Private property on land, is also exempt from confiscation, with the exception of such as may become booty in special cases when taken from the enemy in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even

to an absolute and unqualified conquest of the enemies country." (*Elements of International Law*, page 421.)

In the case before the Supreme Court of the United States, of *Ware, adm'r. of Jones vs. Hylton*, before recited, CHASE, Justice, on this subject, said: "It is admitted that Virginia could not confiscate private debts without a violation of the modern law of nations; yet, if in fact she has done so, the law is obligatory on all the citizens of Virginia, and on her courts of justice; and, in my opinion, on all the courts of the United States. If Virginia, by such conduct, violated the law of nations, she was answerable to Great Britain, and such injury could only be redressed in the treaty of peace." (1 *Peters' Cond. Repts.*, 106.) PATTERSON, Justice, said: "It has been made a question, whether the confiscation of debts, which were contracted by individuals of different nations in time of peace, and remained due to individuals of the enemy in time of war, is authorized by the law of nations among civilized States? I shall not, however, controvert the position that, by the rigor of the law of nations, debts of the description just mentioned may be confiscated. This rule, by some, has been considered a relic of barbarism; it is certainly a hard one, and cannot continue long among commercial nations; indeed, it ought not to have existed among any nation, and, perhaps, is generally exploded at the present day in Europe." (1 *Peters' Cond. Repts.*, 126.) At page 127, the same judge says: "The relation which the parties stood in to each other at the time of contracting these debts, ought not to pass without notice. The debts were contracted while the creditors and debtors were subjects of the same king, and children of the same family. They were made under the sanction of laws common to and binding on both. A revolution war could not, like other wars, be foreseen or calculated upon. The thing was improbable. No one, at the time that the debts were contracted, had any idea of a severance or dismemberment of the empire, by which persons, who had been united under one system of civil polity, should be torn asunder and become enemies for a time, and perhaps aliens forever. Contracts, entered into in such a state of things, ought to be sacredly regarded. Inviolability seems

to be attached to them." WILSON, Justice, said: "When the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement. By every nation, whatever its form of government, the confiscation of debts has long been considered disreputable; and we know, that not a single confiscation of that kind stained the code of any of the European powers who were engaged in the war which our revolution produced." (1 *Peters' Cond. Repts.*, 128.)

It is clear that, if the laws of nations did not tolerate the confiscation of private debts and private property, in the eighteenth century, that, with nearly a century's advance of commerce, civilization, and christianity, the improvements and meliorations of the usages and customs of nations toward each other, growing out of those benign influences, must render the barbarous rules of the past intolerable.

Neither the laws of nations, nor the laws and usages of war, as now recognized, authorize this general and universal confiscation of private property.

But, it may be said that neither the laws of nations, nor the usages of war, are obligatory on a sovereign, if he sees proper to prescribe another rule, and this may be true; yet, when our government attempts to prescribe a rule, such rule must be in subordination to the constitution, and, if violative of any constitutional provision, it is not a rule, but a nullity.

The property forfeited by this act of Congress is not, by the law of nations, prize; it is not booty, nor contraband of war. It is not forced military contribution, nor is it property used or employed in the war or in resistance to the laws. But it is private property, outside the conflict of arms, forfeited, not because it is the instrument of offense, but as a penalty for the crime of the owner.

But, if this were not so, the 3d section, 3d article United States constitution, by declaring in what treason shall consist, what shall be the requisite proofs, and the limitation on its punishment, has most effectually placed a limitation on the war power as to this crime. Treason can only be committed by levying war against the United States, or in adhering to their

enemies, giving them aid and comfort in time of war. Treason can only be committed by persons owing allegiance, either absolute as citizens, or qualified as denizens.

In order to punish treason, the offender must be indicted, arraigned, convicted and adjudged guilty, and then, if sentenced to death, no other punishment can be inflicted; but, if the death penalty is not prescribed, fine, imprisonment, and forfeiture for life, may be prescribed—but, to the war power, belongs no right of punishment for treason. No military court, no military tribunal, can, or dare attempt to punish for treason. The trial of this crime has been confided, by the constitution, to the civil courts of the country; the punishment is to be prescribed by the laws of the land, with the limitation that no attainder shall work corruption of blood or forfeiture, except for the life of the person attainted.

It has been well said by Judge Thomas, a representative in Congress, and one of Massachusetts' most accomplished lawyers, "that the powers of war are almost infinite. The resources of this vast country spring to the open hands of this government. All that men have, even to their lives, are at the service of their country. The government can raise an army of over seven hundred thousand men; can arm and equip them with the best appliances of war; can cover the rivers and bays and seas with its navy; can blockade a coast of three thousand miles; and may cut down the last rebel on the field of battle. Such is the power of war. But when all these powers shall have been used, when peace shall have been restored, or when the rebels shall come and lay themselves at the feet of the government, or be taken captive by its armies, then, also, will this government be shown to be the most powerful and the noblest on the earth, not because the captured rebel is at its mercy, but because he is not. Because, under the shield of the constitution, the rebel at its feet is stronger than armies, stronger than navies. It cannot touch a hair of his head, or take from him a dollar of his property, until it shall have tried and condemned him by the judgment of his peers and the laws of the land. Are these written constitutions established to give to government power, without limit,

over the property, liberty, and life of the citizen, or, are they made to define and limit the power of the government, and to shield and protect the rights of the citizen?"

When this vast army, of three-fourths of a million of citizen soldiers, shall have accomplished its mission; when they shall be dispersed, sent to their homes, again to resume their domestic duties and the callings of civil life; when the constitution and laws of the United States shall again be administered through the agencies of its civil officers; when the citizens shall again apply to the civil courts for the redress of their grievances and the vindication of their rights; when honest, faithful, intelligent men, who have made the constitution and laws of their country the study of their lives, unstirred by passion and unbiassed by partiality, shall sit in the "judgment seats," then may we hope to see the constitutions of the United States and of the respective States administered as the supreme law of the land; then may we hope that the citizen will be made to know that the acts of Congresses, and proclamations of Presidents, made without the authority of the constitution and in contravention thereof, are mere *brutem fulmens*—nullities.

The infinite wisdom of the constitution is made the more manifest by the magnitude of this rebellion. For, when it shall have been subdued, and the majesty of the constitution and laws of the United States shall be acknowledged throughout its broad confines, and when it shall have exhausted the measure of punishment it may prescribe, within constitutional limits, on the guilty, there the punishment must cease. The constitution does not permit the calamity to be visited on the unoffending offspring, and many millions of these reduced to a state of absolute and unmitigated pauperism.

If it be said that Congress may prescribe a fine, and that such would operate as an absolute forfeiture *pro tanto*—to that extent,—it may be replied, that when Congress shall exercise this power, under the constitution, it will be the duty of courts to administer its enactments, unless these should conflict with article 8, amendments to the constitution, which provides, that "excessive bail shall not be required, nor excessive fines im-

posed, nor cruel and unusual punishments inflicted." But the right to impose fines for crimes, limited only by said amendments, cannot authorize the exercise of an unlimited power of forfeiture forbidden by another clause of the constitution.

If the principles, herein announced, be correct, it follows, that the absolute forfeiture of the slaves, and freedom thereof of those convicted under the first and second sections of said act of Congress—although the conviction and judgment otherwise may be strictly in accordance with the constitution—is also unconstitutional and void, as being in conflict both with the constitution of the United States and of this State; for, whatever may be the embarrassments growing out of the repugnance of those who may administer the Federal government, to its holding slaves, or the use to which they may desire to dedicate them, in the exercise of the right and power of the government to forfeit for the life of the offender, on judgment of treason against him, yet this cannot confer on the government power forbidden by the constitution of the United States and violative of the State constitutions.

The principles intended to be illustrated in this opinion are briefly:

1. That the government of the United States is sovereign, supreme, and designed to be perpetual, but is a government of enumerated powers and specified grants, including such as are necessarily implied.

2. That the State governments, for all purposes not confided to the Federal government, are also sovereign, supreme, and designed to be perpetual.

3. That these two governments are parts of one whole, and that the constitution and laws of the Federal government is part of each State government, and, *vice versa*, the constitution and laws of the respective States are parts of the Federal government, within such respective States.

4. That in a conflict as to supremacy, between the United States and a State, the States have agreed to abide the decision of the Supreme Court of the United States.

5. That there is no constitutional mode by which a State and its citizens can withdraw from the Union, repudiate the

allegiance due the United States, and reject its authority, and that all such attempts violate both the Federal and State constitutions, and are revolutionary.

6. That on a restoration of the national authority over the seceded States, their constitution and laws, which existed and were recognized by the Federal government previous to the rebellion, become operative as part of the national government.

7. That the States cannot, constitutionally, by legislative, executive, or judicial action, destroy the United States government, nor can they constitutionally destroy it by force of arms. Nor can the United States constitutionally destroy a State government by any or all of these means.

8. That the United States constitution confers ample powers on the government to enforce the observance of its laws, either peaceably, or by force if necessary, on the part of the States and the citizens of the States, but cannot make war on a State for any purpose of its destruction.

9. That the government of the United States is under constitutional obligation to protect each State against invasion, and domestic violence, and revolution, and every loyal citizen has a right to expect a faithful observance of this obligation.

10. That, as the constitution and laws of the United States are supreme over the constitution and laws of a State, there can be no conflict; all laws, therefore, must be in conformity to the Federal constitution, and not in conflict with a State constitution, to be valid.

11. That both the Congress of the United States and State legislatures are prohibited from passing bills of attainder, and that none but judicial attainder is known to our constitutions, whether Federal or State.

12. That judicial attainder can only be had upon a criminal proceeding, and must be upon indictment, or other legal proceedings, with a trial and judgment as upon an indictment.

13. That treason against the United States can only be committed by actually levying war against them, or in adhering to their enemies, in time of war, giving them aid and comfort.

14. That the trial and punishment for treason has been confided, by the constitution, to the courts of the country; the punishment to be prescribed by Congress, within constitutional limits.

15. That even upon judicial attainder, for treason, there can be no forfeiture of either real or personal estate, save for the life of the person attainted.

16. That the limitation on the power to punish for treason is a limitation on the war power, as to this crime.

17. That this act of Congress of 17th July, 1862, to suppress insurrection, &c., is in derogation of the personal rights, and rights of property, of the citizen as guaranteed both in the Federal and State constitutions.

18. That said act is not in conformity with the Federal constitution, and is in conflict with the constitution and laws of the States, and derogatory to their sovereignty.

19. That said act cannot be justified by the laws of nations, nor by the usages of war as recognized by modern civilized and christian nations.

20. That being in conflict with the United States constitution, it cannot be upheld as a rule prescribed by a sovereign, in derogation of the laws of nations, but is a nullity.

Believing that the principles involved and the consequences growing out of them, more important than any heretofore before this court, it has seemed proper, to me, to array the authorities and reasons, of those great luminaries, which have preceded me, rather than attempt an original argument; hoping also that it will be more conducive to the establishing of sound constitutional principles than could have been reasonably expected had the argument rested on my own humble authority.

R. K. WILLIAMS.

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ACT OF ASSEMBLY—

1. An act of the General Assembly, which provides that it shall take effect from its passage, takes effect on the day of its approval by the Governor, and must be regarded as being in force during the whole day upon which it is approved, in conformity to the general rule that where a computation is to be made from an act done, the day upon which the act is done is to be included.—*Mallory & Co. vs. Hiles*.... 53

2. A judgment was rendered on the 24th day of May, 1861, for debt due by note, the same day on which the Governor approved the act, entitled, "an act to suspend the circuit and other courts in this Commonwealth, and for other purposes," by which the rendition of such judgments was prohibited from the passage of the act until the 1st day of January, 1862. It did not appear at what hour the act was approved, nor at what hour the judgment was rendered. *Held*, that the judgment was improperly rendered, because the act was in force during the whole of the day.—*Id*..... 54

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See Notice.

ALIENS—

1. An alien cannot inherit land in this State. (*Hardin*, 61; 2 *Met.*, 187.) But an alien friend, residing in this State two years, is entitled to receive, hold and pass any right to land within the Commonwealth during the continuance of his residence after that period. (1 *Statute Law*, 112; 1 *Revised Statutes*, 239).—*Yeaker vs. Yeaker*..... 33

2. Where by a treaty with a foreign nation, foreigners are allowed three years within which to claim real estate coming to them in this State by devise or descent, and to make disposition thereof, they must assert their right within that period, because there is nothing forbidding the State legislation which denies the right to that class of persons after that time—the State law being so far affected by the treaty as to become inoperative for that period but no further.—*Id*..... 33

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/ Assignments—Assignor and Assignee.

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2. The right of an attaching creditor, (under the act of 1796 to prevent fraudulent sales and conveyances,) to set aside a sale which is merely fraudulent and colorable, and to subject to the payment of his debt the property and effects of the fraudulent vendor, is not taken away or impaired by the act of 1856 to prevent preferences among creditors in contemplation of insolvency. The former act was not repealed by the latter; they embrace distinct classes of cases, and provide appropriate remedies for each.—*Millitt vs. Pottinger*.....213
3. The act of 1856, *supra*, does not prohibit, or afford a remedy for, sales or assignments that are merely fraudulent, although it prohibits the preference which the act of 1796 allowed.—*Ib*.....213
4. To maintain the right conferred upon creditors by the act of 1856, *supra*, it is indispensable to show: *first*, that the sale, mortgage or assignment was made "in contemplation of insolvency," and, *second*, that it was made by the debtor "with the design to prefer one or more creditors, to the exclusion in whole or in part of others." The absence of either of these essentials is fatal to the claim of the party seeking the benefit of the act, however fraudulent the transaction may be.—*Ib*.....213
5. In July, 1861, a debtor conveyed 70 acres of land to a creditor, in payment of \$1,000 due him. In November afterwards, he conveyed the residue of his land to sureties, in consideration of their agreeing to pay debts, amounting to \$5,020, for which they were bound for him. At the time of the first conveyance he owned no property subject to his debts except the lands, and his debts amounted to over \$12,000. The lands were worth about \$6,000. *Held*, That the conveyances were made in contemplation of insolvency, and for the purpose of preferring some of his creditors over others.—*Story vs. Graham*.....319
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ASSIGNOR AND ASSIGNEE—

1. The payor of a note, when sued by an assignee, has not merely an equitable, but a legal right to avail himself, as matter of defense, of any usury embraced in the note, or of any payments made to the payee before notice of the assignment.—*True, &c. vs. Triplett*..... 57
2. Payor of a note, sued by assignee of payee, pleads certain payments to payee before notice of the assignment, as a set off, and usurious interest embraced in the note, as a counter claim. *Held*, That the answer presents only matter of defense, and no reply is necessary; and that the assignor is not a necessary party to the controversy between the payor and assignee.—*Ib*..... 57
3. By the law of this State, a remote assignor of a note is not primarily liable to the holder; and the immediate assignor is only liable for the consideration received, with six per cent. interest, and the holder cannot make him liable without first prosecuting the payor with diligence. Otherwise by the law of Louisiana.—*Short, &c. vs. Trubue*.....299

Attachments.

ATTACHMENTS—

1. The *Revised Statutes*, chap. 56, art. 2, sec. 6, provides that upon the return of an attachment for rent issued by a justice of the peace, to the circuit court, "the proceeding shall be the same as on other common law attachments." This must be construed as referring to attachments then authorized by the *Code of Practice*, title 8, chapter 3. An order discharging such attachment, on motion, upon the ground that it was obtained upon an insufficient affidavit, is not a final order from which an appeal can be prosecuted. The party desiring a reinstatement of the attachment should obtain leave and apply to a judge of the court of appeals. (*Original Code*, secs. 386 to 389.)—*Leet vs. Lockett*..... 56
2. How a valid statutory bond to perform the judgment of the court in an attachment case may be enforced.—*Ib.*..... 56
3. A judgment, giving priority to one creditor over another, as to attached funds of a debtor, which does not distribute the fund, nor give any other relief to either of the parties, is not a final order. (*Bondurant vs. Apperson*, ante.)—*Hanson vs. Bowyer*..... 108
4. The filing of an affidavit by the defendant controverting the ground upon which an attachment issued, and praying for a discharge thereof, is an appearance to the action. The attachment authorized by section 221 of the *Civil Code* is a provisional remedy in a personal action. It is not distinct and cannot be separated from the action. They constitute but one proceeding.—*Duncan vs. Wickliffe*..... 118
5. In section 289 of the *Civil Code*, which declares that the affidavit of the plaintiff upon which the attachment is issued, and the affidavit of the defendant controverting that of the plaintiff, shall be regarded as the pleadings in the attachment, the words, "and have no other effect," were introduced merely for the purpose of preventing the affidavits from being regarded as evidence.—*Ib.*..... 118
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7. The courts incline to an equitable construction of the attachment laws, so as to secure the rights of creditors, and to make the statutes remedy the evils as designed by the legislature enacting them. (10 *Grat.*, 289; 10 *Ib.*, 448; 10 *Rich.*, 15.—*Ib.*..... 285
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9. It is error to render judgment sustaining an attachment against a non-resident defendant, not summoned, and who does not appear, without a warning order against him. (*Civil Code*, sec. 88.)—*Allen vs. Brown*..... 342
10. The affidavit of the plaintiff to obtain an attachment must state that his claim is just. The omission of such statement is cause for reversal. (*Civil Code*, sec. 222; 17 *B. Mon.*, 542; 3 *Met.*, 281.) But, upon the return of the cause to the circuit court, the plaintiff may be allowed to amend his affidavit. (*Civil Code*, sec. 161.)—*Ib.*..... 342
11. The act of March 15, 1862, (*Seas. Acts*, 92,) relates only to the "grounds of attachment," and authorizes the plaintiff to amend merely for the purpose of stating grounds which existed when the attachment was obtained, not set forth in the original affidavit, or new grounds arising subsequently. It does not authorize an amendment with reference to the nature, justness, or amount of the plaintiff's claim. But—

 Bastardy—Bills of Exchange.

Section 161 of the Civil Code applies to proceedings by attachment on affidavit, and authorizes the amendment of a defective affidavit. There is no difference in principle between allowing the amendment of a petition on which an attachment issues, and the amendment of an affidavit on which an attachment issues. The ruling in *Pool vs. Webster, &c.*, (3 Met., 282,) not adhered to. (2 Met., 286; 18 B. Mon., 236; 17 Ib., 324; 2 Met., 138.)—*Ib.*.....342

12. An attachment, issued upon a defective affidavit, is not void; but is within the general rule that the proceedings of a court, having jurisdiction of the person or subject, are not void, however erroneous they may be. The ruling in *Pool vs. Webster*, (3 Met., 281,) not adhered to.—*Ib.*.....342

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2. Where a defendant in a bastardy case fails to appear, in compliance with his recognizance, the court is not thereby deprived of its jurisdiction over the case, but may give relief by trial and judgment against the defendant upon his failure to appear, and by an attachment to compel performance of the judgment.—*Ib.*..... 66

3. That the father of a bastard child is an infant does not relieve him from a prosecution, under the statute, for its support. Infants are liable for their tortious acts. But a guardian *ad litem* should be appointed to defend him.—*Ib.*..... 66

4. Under the provisions of the Civil Code a bastardy case is a special proceeding, and not an action. It is not for a penalty or forfeiture, nor is it for the enforcement of a private right within the meaning of the Code.—*Ib.*..... 66

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2. In a suit by an indorsee against the acceptor of a bill of exchange, where the first part of the bill sued upon has been accepted, and protested for non-payment, the production of that part of the bill is *prima facie* sufficient to entitle the plaintiff to a judgment. It is not necessary to file the second part. The defendant must show that some ground of defense exists which displaces the *prima facie* title made out by the plaintiff. So, where the action is for non-acceptance, it is sufficient to produce the part of the bill protested for non-acceptance. (13 Peters, 205.)—*Johnson vs. Ofsutt*..... 19

Boundary—Confiscation.

3. The holder's discharging, or giving time to, any of the parties on a bill of exchange, will be a discharge of every other party who, upon paying the bill, would be entitled to sue the party to whom such discharge or time has been given. Thus the drawer and indorsers will be discharged by a release of the acceptor, or by a valid agreement between the holder and acceptor, in which the drawer and indorsers do not concur, whereby time is given the acceptor for payment of the bill after it is due.—*Bank of Ky. vs. Floyd* 159

4. But a discharge or release by the holder to any party upon the bill, will not discharge the antecedent parties who are liable to him for the debt, but will only discharge the subsequent parties. Thus, (the parties being severally liable, according to their respective positions, on the bill,) a release by the holder to the last two indorsers will not discharge the liability of either the drawer, acceptor, or prior indorser.—*Id* 160

5. In such case the antecedent parties are not entitled to have the sums severally paid by the two indorsers to the holder of the bill, in consideration of their release, credited as payments upon the bill. The amount paid neither increased nor diminished the liability of the prior parties.—*Id*..... 160

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1. The act of Congress, approved July 17, 1862, entitled, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," after declaring that all the estate and property, money, stocks, and credits, of certain officers of the Confederate States, and of certain other persons therein mentioned, shall be seized and confiscated, by proceedings *in rem* in the Federal courts, declares that, "it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." *Held*, First, that the last named provision applies to suits for the recovery of debts; secondly, that it was designed to apply to suits in the State as well as the Federal courts.—*Norris vs. Doniphan*..... 385

2. If the provisions of the act, concerning the seizure and confiscation of such property, are unconstitutional and void, it seems clear that Congress has no power to prohibit the State courts from giving to the owners the relief to which they are entitled by the laws of the States.—*Id*..... 385

3. The forfeitures, or confiscations, proposed by this act, are to be effected on account of offenses which the owner may commit, without reference to the use of his property; hence, the doctrine that property which is used to violate a blockade, or revenue laws, may be forfeited by proceedings *in rem*, without conviction of the owner, has no application to this case.—*Id*..... 385

4. That clause of the constitution which authorizes Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," has no bearing on this question. It relates only to wars with foreign nations. (*The Brilliant vs. United States*).—*Id*..... 385

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5. The usage of nations, if applicable to the case, does not sanction the confiscation of property here belonging to rebels, and debts owing to them, before the commencement of hostilities.—*Ib*.....385
6. A sovereign, engaged in a public war, may disregard the usage of nations and establish a different rule toward the enemy, which shall bind those within his jurisdiction.—*Ib*.....385
7. The existence of a public war gives to Congress the power, as a belligerent right, to confiscate enemy's property on land, though such is not the usage of nations.—*Ib*.....386
8. Congress possessed the power to pass the act in question if the existence of civil war gives to the government all the belligerent rights, against rebellious citizens, which it possesses against alien enemies during a public war.—*Ib*.....386
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10. The right, given by the constitution, to make war upon rebels, gives the power to perform acts of war, and no other power whatever.—*Ib*.....386
11. The seizure and confiscation of enemy's property on land are not acts of war. (*Brown vs. United States, 8 Cranch.*)—*Ib*.....386
12. The constitution does not prohibit the confiscation of the property of alien enemies. The protection received by aliens, residing abroad, with reference to their property here, is due, not to the constitution, but to international comity, which may be suspended during war. But the constitution, and not the law of nations, governs the relations between the government and citizens of the United States. They, though traitors, must be dealt with according to the constitution.—*Ib*.....386
13. The act under consideration is unconstitutional, because it attempts to authorize the confiscation of the property of citizens, as a punishment for treason and other crimes, without due process of law, by proceedings *in rem* in any district in which the property may be, without presentment or indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt as would be sufficient proof of any fact in admiralty or revenue cases. (*Con., art. 3, sec. 2, sub. 3, and sec. 3, sub. 1; 5th and 6th amendment.*)—*Ib*.....386
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1. A writing imports *prima facie* a valuable consideration; but the presumption of a sufficient consideration ceases to exist whenever the party relying upon the agreement undertakes, though unnecessarily, to show what was the consideration. (*7 Johs., 321; 1 A. K. Mar., 331.*)—*Steadman vs. Guthrie*.....147
2. Future forbearance by the depositors of a banker can form no consideration for an absolute agreement by guarantors to pay the depositors without reference to such forbearance.—*Ib*.....147

Consideration—Constitutional Law.

3. Contracts, required by the statute of frauds to be in writing, stand upon the same footing as other written contracts with respect to the consideration, which need not be expressed in the writing, but may be proved, when necessary, or disproved, by parol or other evidence; and this whether the consideration be executed or executory.—*Id.*.....147

4. In an action upon a writing, purporting on its face to be an unconditional guaranty, but which does not express the consideration upon which it is executed, the averments of the petition as to the consideration show that the contract was conditional, depending for its validity upon the performance of certain acts by the promisee. *Held*, That there is no variation between the contract contained in the writing and that set forth in the petition.—*Id.*.....147

5. A writing was as follows: "We the undersigned agree to guaranty the depositors of W. E. C., in the payment in full of their demands against said C., on account of money deposited with him. We have entire confidence in his ability to meet all demands." In an action against the guarantors, the petition alleged that public confidence in C. was impaired, and that it was executed in consideration that the plaintiff and the other depositors would forbear to withdraw their deposits, and would permit C. to keep and use the same during the panic, or until he could conveniently pay them, and to prevent "a run upon him" and of sustaining his credit. *Held*, That the plaintiff is not estopped from relying upon the alleged consideration, which is not inconsistent with the writing. The writing neither estops the plaintiff nor the defendants from showing the consideration upon which it was founded.—*Id.*.....147

6. In such case, the petition should allege forbearance by all the depositors. Where, however, it is averred that the guarantors designed the paper as a guaranty to such of the depositors as might give the forbearance to C., and that they executed it in consideration of such forbearance to be given by the several depositors; in a suit by one, it is not necessary to allege forbearance by all.—*Id.*.....148

7. If the alleged guaranty was given in consideration that the several depositors would forbear to demand their deposits, the giving of forbearance would be sufficient. An agreement to give it, without doing so, would not.—*Id.*.....148

8. If the consideration was forbearance to C. during the panic, or until he could conveniently pay, his failure, and the close of his house a few days after the execution of the guaranty, dispensed with the necessity of further forbearance; and forbearance until that time formed a sufficient consideration to support the contract.—*Id.*.....148

9. One who advanced money to enable another to conceal his crime and stifle a prosecution against him, cannot recover. Otherwise where the offense is not a felony. And his assignee occupies no better attitude.—*Barclay vs. Breckinridge.*....374

CONSTITUTIONAL LAW—

1. There is no provision of the constitution of Kentucky, which indicates an intention to deprive the legislature of the power which it possessed, without constitutional grant, to punish a person for challenging, in this State, any one, whether a citizen or alien.—*Moody vs. Commonwealth.*.....1

2. By the constitution of the United States where a treaty, made under the authority of the United States, conflicts with a law of the State, the law must give way to the extent of its conflict with such treaty.—*Yeaker vs. Yeaker.*.....33

Constitutional Law—Contracts.

3. It is a well settled rule that where a State law is deemed unconstitutional, because opposed to the constitution, laws and treaties of the Federal government, it is only void so far as it contravenes the constitution, laws or treaties.—*Ib.*..... 33
4. The first section of the act of May 24th, 1861, (*Session Acts*, page 2,) forbidding the rendition of judgments for money for the period therein named, is constitutional. The principles settled in the case of *Johnson vs. Higgins*, (3 Met., 567,) holding it to be constitutional, are approved.—*Barkley, &c. vs. Glover, &c.*..... 44
5. Any attempt by the Legislature so to change the remedy as to impair the obligation of a contract is prohibited by the constitution.—*Berry, &c. vs. Ramsdall*....392
6. A statute of limitation, which does not allow a reasonable time after its passage for the commencement of suits on existing causes of action, is unconstitutional. (4 *Wheat.*, 207; 3 *Peters*, 290; 2 *Greenleaf*, 294; 2 *Mass.*, 436.) Thirty days is not a reasonable time.—*Ib.*.....392
- See *Confiscation*.

CONTRACTS—

1. In a sale of a tract of land the bond, executed to the purchaser, recited that a certain sum was to be paid on the 1st of March next after the date of the writing, and the residue in two annual instalments, for which the purchaser executed his notes, absolute in their terms. The bond stipulated that possession was to be given on a named day, and a deed to be made with general warranty "when the first payment is made." Suit was brought upon the note given for the last instalment of the purchase money, the first payment having been made, the vendor having failed to make the deed. *Held*, That the contract to convey and the contract to pay are mutual executory agreements, not dependant upon each other. The failure to convey cannot avail as a defense to defeat the action.—*Hutchings vs. Moore*.....110
2. Sale of a farm "containing 160 acres, more or less," particularly described in the bond for a conveyance, for the consideration of \$8,400, "being at the rate of forty dollars per acre," (as the bond recites,) *held* to be a sale by the acre, and not in gross, and the purchaser liable to pay for a surplus of eleven and a half acres contained in the tract—he cannot surrender the surplus land to his vendor.—*Ib.*.....112
3. It has been held that in the sale of a tract of land of about 135 acres, a deficit of two acres was large enough, considering the price of the land, (\$30 per acre,) to entitle the purchaser to relief. (*Reed vs. Quisenberry*, *Mass. Opin.*, winter term, 1846.) *Argu.*—*Ib.*.....111
4. In a contract in writing for the delivery of a specified quantity of charcoal, at a fixed price, if the purchaser receive more than he is entitled to, he must pay for the excess what it is worth, whether he had knowledge of it or not.—*Childwell, &c. vs. Dawson*.....122
5. In a suit upon such contract, to entitle the plaintiff to recover for the excess, the petition should allege the value thereof.—*Ib.*.....121
6. A conditional promise for the payment of money becomes absolute as soon as the condition is fulfilled, and may be declared on as if it had never existed. For as the engagement of the promisor finally results in such cases in an unqualified obligation, the law implies an unqualified promise for its fulfillment. (1 *Swick's Leading Cases*, 628.)—*Stedman vs. Guthrie*.....147
7. A parol agreement between debtor and creditor that a buggy of the former should be valued by two men to be thereafter selected for that purpose, the creditor to take it at such valuation and credit the amount he held on the debtor; if the valuation should exceed the amount of the note the creditor to pay the excess. The

Contracts.

had been no valuation, no change of possession, when an attachment, sued out by another creditor of the debtor, was levied upon the property. *Held*, That the agreement passed no right, legal or equitable, to the property, and that the attachment be sustained.—*Culbert vs. Sussan* 240

8. For a breach of the agreement, *supra*, by either party to it, an action for damages would be the only remedy.—*Id.* 245

9. The intention of the parties, to be gathered from the entire instrument—and the meaning or effect of a particular word—must always determine the question of construction of the contract.—*White vs. Booker* 267

10. After reciting that B. had bought of W. 100 hogs, of a certain description; to be delivered at the time, place and price specified, the agreement stipulates that "B. feeds and returns him, W., 250 hogs, no hog to weigh less than 220 pounds, and each and every hog to be well fattened, and no sow with pig, and to average 300 pounds gross." *Held*, That hogs fed by others than himself, of the requisite description, might be furnished by B. in fulfillment of his contract.—*Id.* 267

11. A note given, "we or either of us, directors of Centreville and Jacksonville Turnpike Co., promise to pay," &c., is the individual obligation of those who signed. It is not the obligation of the corporation.—*Whitney vs. Sudduth* 296

12. An agreement to perform an act at a particular place is presumed to be made with reference to the law of that place; and an agreement to perform an act, without designating a place of performance, is presumed to be made with reference to the law of the place at which the agreement is made. These presumptions are conclusive. The same rule applies to both parties to the contract.—*Short, & Co. vs. Tratus, & Co.* 299

13. The indorser of a note promises, upon certain conditions, which are not expressed in the contract of indorsement, but which are implied by law, that he will pay it; but not that he will pay it at the place named in the note for payment. His promise is general for the payment of the note, on the implied conditions; and such general promise, not specially to be performed elsewhere, is governed by the *lex loci contractus*, which must determine the conditions upon which he is to be held liable. *Id.* 299

14. In an action against the indorser of a note, payable in one State and indorsed in another, the laws of which differ, the liability of the indorser depends upon the law of the place of indorsement, and not upon that of the State where it is payable, nor upon the *lex domicilii*.—*Id.* 299

15. The indorsement, by a citizen of Louisiana, made in Kentucky, on a note payable to him in Louisiana, is governed by the law of Kentucky.—*Id.* 299

16. A party, in order to obtain here, the benefit of the law of another State, should aver, as well as prove, that that was the place of the contract.—*Stern vs. Freedman* 309

17. A person is not liable upon a contract which he makes as the agent or trustee of another, with authority to do so.—*Lewis vs. Harris* 353

18. An agreement to pay for lottery tickets delivered to a party by the managers of a lottery, or return them not sold, made in Delaware, and not prohibited by the laws of that State, and containing no stipulation to do any act in violation of the laws of any other State, is valid; and notes and mortgages executed by such party, in consideration thereof, is enforceable here, although such party may have violated the laws of another State in his disposition of the tickets.—*Jamison vs. Gregory* 363

19. In contracts, called "contracts of sale or return," the property in the goods

Contracts—Conveyances.

passes to the purchaser, subject to an option in him to return them within a fixed time or in a reasonable time; and, if he fails to exercise this option by so returning them, the sale becomes absolute and the price may be recovered, in an action for goods sold and delivered. (3 *Eng. Law and Eq. Rep.*, 311; 3 *Duer*, 336; 14 *Johnson*, 167.)—*Ib*.....363

20. Where lottery tickets are obtained by a party living in one State, upon an order sent to the vendors in another, the contract must be regarded as having been made in the latter State, and its legality tested by the laws in force there. (3 *McL. Mass.*, 207.)—*Ib*.....364

21. Note given for "one hundred dollars worth of sawing," in consideration of real estate. The labor stipulated to be performed not having been demanded—*Held* that there is no right of action in favor of the covenantees, and no valid or subsisting lien upon the property.—*Jenkins vs. Smith*.....380

22. Where two writings are executed at the same time, with reference to each other and to the same subject matter, they constitute but one agreement, and are to be construed as if written on the same piece of paper.—*Knott's adm'r. vs. Hogan*.. 99

CONVEYANCES—

1. In the absence of an averment that a conveyance was made in another State, and of proof of what the law of such State is on the subject, the validity of the deed must be tested by the laws of this State. (3 *A. K. Mar.*, 174.)—*Hurd vs. Courtney*.....139

2. A conveyance, though voluntary, is not on that account alone void as to subsequent creditors.—*Ib*.....140

3. Under the statute to protect creditors against fraudulent and voluntary conveyances, a liberal construction, in allowing to persons who are, or might be, injured by such a conveyance, the character of creditors, ought to prevail. *Argu.* (1 *Amer. Lead. Cases*, 73.)—*Ib*.....140

4. *Quere.* Is the liability of a sheriff to the plaintiff in an execution, from the time it is placed in his hands, such an indebtedness as to give to the sheriff the character of a debtor within the meaning of the statute, *supra*?—*Ib*.....140

5. Where a sale and conveyance of land, made by one of two executors, is a nullity, and, therefore, the notes executed by the purchaser are without consideration, it cannot be rendered valid, without the consent of the purchaser, by tendering to him the deed of the person to whom the land and its proceeds were devised.—*Wells vs. Lewis*.....269

6. A deed, though acknowledged and left in the clerk's office for registration, is not constructive notice to creditors and purchasers, until the tax be paid thereon. (*Rev. Stat.*, chap. 24, sec. 32.) As to them, the vendee has but an equitable title.—*Phillips vs. Clark*.....348

7. A deed was acknowledged and left for registration, but the tax not paid on it; the vender, who is insolvent, remained in possession of the lot conveyed, and contracted with a mechanic to build a house upon it. While the building was progressing, the vendees, aware of it, stand by, see it go up, remain passive and silent—the mechanic not having had any notice of their claim. *Held*, (in a suit to enforce the mechanic's lien,) that the property is subject thereto.—*Ib*.....348

8. *Sec. 11, of chap. 24, of the Revised Statutes*, does not avoid an unrecorded assignment in behalf of creditors having notice thereof before the acquisition of a legal title to the property. (17 *B. Mon.*, 625.)—*Ward vs. Crotty, &c.*..... 59

Conveyances—Corporations.

9. A conveyance by the owner of land passes the legal title to all the land within the designated boundaries, though they may contain more than the quantity mentioned in the deed.—*Jennings vs. Monks*..... 108
10. In a judicial sale, and conveyance to the purchaser by commissioner, of a tract of land, described by metes and bounds as containing 174 acres, made in a proceeding to satisfy the debts of the owner, where the tract turns out to contain 214 acres, the commissioner's deed is not void as to the surplus, but passes the legal title to the whole tract.—*Id*..... 103 ✓
11. In such case, where the vendee of the purchaser derived no benefit from the mistake, but, without notice of it, purchased and paid for all the land, including the surplus, he will be protected. (2 *Bibb*, 317; 1 *A. K. Mar.*, 72.)—*Id*..... 104

COUNTY COURT—

The right of approval, and implied right of disapproval, of the appointment of a deputy by the sheriff conferred by law on the county court, belongs to the executive and not the judicial power of the court. (3 *J. J. Mar.*, 401.)—*Applegate vs. Applegate*..... 236
See *Mandamus*.

COVENANT—

1. An instrument in writing recites that "for the satisfaction and security of J. M.," it proceeds to "re-state" a subsisting parol agreement or understanding, the substance of which is set forth in the instrument. Held, That the writing is a covenant, binding as such on the parties, and not a mere memorandum of the prior parol agreement.—*Metcalf vs. Poindexter* 50
2. All written contracts are, in a certain sense, but *re-statements* of a pre-existing parol agreement between the parties. And the mere fact that the written memorial contains such a recital, cannot operate so to change the character and legal effect of the instrument as to reduce it from the grade and dignity of a covenant.—*Id*..... 50
3. Whether covenants are to be treated as dependent or independent, is a question of construction, which must be determined by the intention of the parties to be collected from the whole instrument.—*Hutchings vs. Moore*..... 110
4. Where a contract to convey land, and the contract to pay therefor, are mutual executory agreements, not dependent upon each other, the non-performance of the one cannot be pleaded in bar to an action brought for the breach of the other. (1 *Bibb*, 454.)—*Id*..... 110

CORPORATIONS—

1. Whether a corporation is public or private depends upon the purposes for which it is formed, and the powers conferred upon it, and not upon the character of its stockholders. It does not alter its character that a corporation, the State, or the United States, own a portion of its stock.—*Bardstown & Louisville Railroad vs. Metcalf* 200
2. The rules of construction which apply to charters delegating sovereign powers to corporations do not depend upon the question whether the corporation is a private or public one, but on the character of the powers conferred, and the purposes of the organization. The power of a railroad or other private corporation to take private property for its use, being a delegation of sovereign power, must be construed as it would be if delegated to a municipal corporation. And the powers of private and public corporations, with respect to their property, are governed by the same prin-

/ Criminal Law—Devises.

ciples, and, in the absence of express provisions of law, depend upon the purposes for which the corporation was formed.—*Id.*..... 299

3. Generally, a private corporation has an implied power to do whatever may be necessary to execute its express powers, and to accomplish the purposes for which it was formed.—*Id.*..... 299

See *Railroad Companies*.

CRIMINAL LAW—

1. Moral insanity, as a ground of defense in criminal cases, is so peculiarly liable to abuse that the utmost care and circumspection are required on the part of the court in presenting to the jury the legal principles relating to it.—*Scott vs. Commonwealth*..... 227

2. To establish moral insanity as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature. But it is not necessary that it should have manifested itself "in former acts of similar character or like nature of the offense charged," to be available as a legal excuse for crime.—*Id.*..... 227

3. Before moral insanity can be admitted to excuse the commission of crime, it must be shown to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings. Whether this impossibility of resistance arises from a subjugation of the intellect by the morbid impulse or propensity, or "from an overwhelming and destruction of the faculties of the mind to the extent of rendering the party incapable of governing his actions," is a point of not much practical importance—though the former mode of expression is preferred as being less calculated to confuse or mislead the jury.—*Id.*..... 227

4. See the opinion for a discussion of the principles touching the question of moral insanity and its admission as a defense in criminal cases, with a reference to authorities.—*Id.*..... 227

5. Where the facts do not show whether the act committed amounted to a breach of trust or felony, the former will be presumed.—*Barelay vs. Breckinridge*..... 374

6. Under sec. 1, of art. 12, chap. 28, *Revised Statutes*, the agent of a corporation who fraudulently converts to his own use money "placed under his care or management as such officer," is guilty of a felony, no matter for what purpose it may have been placed under his care. Not so as to the agent of an individual or private banker, whose guilt, (under section 2,) consists in fraudulently converting the money, &c., "before delivery thereof at the place or to the person to whom the same were to be delivered." Under the latter section it must have been entrusted to him for delivery at some place or to some person. (3 *Gray*, 461.)—*Id.*..... 374

7. Where a clerk of a private banker converted to his own use money, which he charged upon the books of the banker to a depositor, his offense is not a felony.—*Id.*..... 374

DEVISES—

1. Prior to the adoption of the *Revised Statutes* a sale by a testator, after making his will, of either land or personalty, thereby devised, defeated the will *pro tanto*. Since the statute the rule is otherwise as to devises and bequests to an heir of the testator, in which case such sale is not an ademption of the legacy or devise unless the testator so intended—and the burden of showing such intention rests on those

Devises.

claiming against the will. (9 B. Mon., 307; 3 Met. Ky. Rep., 473; 3 Rev. Statutes, chap. 46, art. 5, secs. 1 and 2.)—*Wickliffe vs. Preston*.....173

2. The statute *supra* applies to land as well as to personal property. (*Authorities supra*; Rev. Stat., chap. 24, sec. 25.) And a sale of land for money is a conversion of it within the statute.—*Id.*.....179

3. The Revised Statutes abolish the distinction between the words, "bequeath and devise," "legatee and devisee," "bequest and legacy." (Chapter 21, section 25.)—*Id.*.....179

4. A provision in a will that if the testator should sell real estate devised to one of his children, and should not by will, deed or gift, substitute other real estate in lieu thereof, she was to have its value assigned her out of the testator's real estate not specifically devised—and the absence of such a provision concerning other devisees—*held* not sufficient to show that the testator intended to adeem the devise to the latter if he should sell the lands devised to them; a conclusion strengthened by other clauses of the will.—*Id.*.....179

5. That a testator sold land devised to one of his heirs to pay his debts, which, if not paid by him, would have fallen upon the residuary which he directed to be equally divided between his heirs after the payment of debts—not sufficient to show an intention to adeem the devise.—*Id.*.....179

6. Devise of land to one for life, remainder to another upon condition that the latter pay to a third person a certain sum. If the testator intended that the money should be paid after the termination of the life estate, the remainder vested immediately after the testator's death, and the condition as to the payment of the legacy was a subsequent and not a precedent condition. (5 Pick., 534; 9 Watts, 60; 2 Conn., 201; 6 Gill & John., 507; 8 Peters, 346.) *Duncan vs. Proutie*.....216

7. In the case *supra* it does not appear what was the age of the devisee of the life estate, nor what was the value of the land; nor is there any fact conducing to show what was the testator's intention as to the time when the legacy should be paid, except the provisions of the will. *Held*, That the legacy was not payable until the termination of the life estate. (6 Gill & John., 507.)—*Id.*.....216

8. The payment by the devisee of the remainder, of a part of the legacy, before the termination of the life estate, was an acceptance of the devise of the remainder. Having accepted the devise he must pay the legacy. (6 Paige, 383.) But the voluntary payment of part of it, when it was not due, does not render him liable for the residue during the existence of the life estate.—*Id.*.....216

9. Where land is devised to three devisees, and directed to be sold and the proceeds divided between them, each holds the legal title to a third of the land, subject to be divested by a sale as directed by the will. They may, by agreement, elect to keep the land; or, either of them may require a sale of it, as directed by the will, and a distribution of the proceeds. Neither of them can acquire an indefeasible right to a third of the land, without the consent of the others. (4 Madd. O'N'y. Rep., 484; 2 Bro. C. R., 497; 3 Wheat, 563.) A vendee of one of them may exercise the same rights as his vendor.—*Wells vs. Lewis*.....269

10. The bequest of a particular thing or money, specified and distinguished from all others of the same kind, is a regular specific legacy.—*Broadwell vs. Broadwell*.....290

11. The word *children* does not ordinarily denote *grand children*, and is never so construed except in cases where it is indispensably necessary to effectuate the obvious intent of the testator. (3 Met., 466.)—*Sheets vs. Grubbs*.....359

12. A devise to "the children" of the testator's sister, one of whom was dead at

 Dueling—Evidence.

the time of the execution of the will, passes nothing to the descendants of such decedent.—*Id*339

DUELING—

1. The act of the legislature to punish dueling is not limited to duels between citizens of this State.—*Moody vs. Commonwealth*..... 1

2. An indictment against one for challenging another to fight in single combat with deadly weapons, is sufficient, although it does not aver that the paper therein copied and averred to have been meant and intended by the former as a challenge, was so understood by the parties. Such an averment was unnecessary. (3 *Dana*, 418.)—*Id* 1

See *Indictment. Evidence.*

EMANCIPATION—

1. A testator, in 1837, provided that any of his slaves, at specified periods and at certain ages, wishing to be free, should be delivered "to the colonization society to be transported to Liberia. None of them are to be forced to go. Those that do not go to Liberia are to continue to serve, &c., until they are willing and do go." *Held*, That to entitle them to freedom they must go to Liberia in good faith to dwell there and become colonists. To go with a design to return immediately to the United States, which design is carried out, is not a compliance with the will.—*Winn vs. Sam Martin, (of color.)*231

2. The fact that a slave, thus returning, stayed in New York for about three months before his return to Kentucky, his owner knowing that he was there and making no effort to bring him away, did not give to such slave a right to freedom. He was there not with the consent of his owner, but as a fugitive slave.—*Id*.....232

ESTOPPEL—

Where two executors were authorized to sell land, a purchaser from one of them who, at the time he executed the notes for the purchase money, for the purpose of enabling the executor to sell them, executed and delivered to him a paper stating that he expected to pay the notes at maturity, and had no offsets and would have none against them, is estopped, (when sued by an assignee who purchased them upon the faith of it.) from pleading that the notes are without consideration.—*Wells vs. Lewis*.....269

EVIDENCE—

1. The statements of a witness as to the rules of the *code duello*, in relation to sending and accepting challenges, upon an indictment against a party for sending a challenge, are inadmissible.—*Moody vs. Commonwealth*..... 1

2. Facts stated in the opinion, which the court pronounce sufficient foundation for admitting as evidence, in a prosecution for sending a challenge to fight a duel, letters of persons alleged to have acted as the seconds of the parties; also to excuse the production of the original letters between the principals and their seconds, and to allow the Commonwealth to prove printed copies of the correspondence between them.—*Id*..... 1

3. An entry by the clerk of the circuit court, in the execution book, that the execution was delivered to the sheriff, cannot be impeached by parol testimony in a motion against the sheriff and his sureties for not returning the execution within thirty

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days of the return day. Such entry is conclusive in all collateral proceedings. (*Rev. Stat.*, art. 1, sec. 4; 3 *Starkie's Ev.*, 1042; 13 *Serg. & Rawle*, 254; 2 *Watts & Serg.*, 387; 12 *Grattan*, 277; 4 *Dana*, 500; 3 *Bibb*, 356.)—*Green vs. Goodrum*. 274

4. Parol evidence, concerning a writing and its contents, admitted without objection, is entitled to the same weight as the writing itself, had it been produced.—*Stern vs. Freeman*..... 310

EXECUTORS AND ADMINISTRATORS—

1. It is error to render judgment, even by default, in favor of heirs and distributees against the administrator of an intestate for the amount in his hands, subject to distribution, without requiring a refunding bond from the distributees. (4 *Bibb*, 266; 7 *Mon.*, 643; 3 *J. J. Mar.*, 684; *Civil Code*, sec. 471.)—*Montjoy vs. Pearce*..... 97

2. Sec. 471 of the *Civil Code* is substantially a re-enactment of the statute of 1797, section 50, as construed by the court of appeals in the above cited cases.—*Ib*..... 97

3. In a suit by heirs and distributees of an intestate against the administrator and his sureties in the administration bond, brought to recover the amount in the hands of the administrator subject to distribution, the petition must set out the terms or substance of the bond alleged to have been executed by them—otherwise it will not show a cause of action against the sureties. (14 *B. Mon.*, 86; *Ib.*, 255.)—*Ib*..... 98

4. Where a testator not only authorized his executor to sell land, but devised to him the land itself, giving to the devisee only the proceeds when sold, an action for the recovery of the land should be in the name of the executor.—*Jennings vs. Monks*..... 103

5. Upon the marriage of an administratrix she ceases to be the personal representative of the intestate; and an action against her, after that event, will not lie to establish a debt against his estate and test the question of assets to discharge the debts. (*Rev. Stat.*, chap. 37, art. 1, sec. 16.)—*Young vs. Dukme & Co*..... 239

6. The principle that a personal representative is regarded in equity as a trustee for creditors and others interested in the estate, that the assets are trust funds for their benefit, and that a court of equity will take jurisdiction in favor of a creditor who has not even obtained a judgment at law, not only to compel a discovery, but also to render the personal representative liable for a breach of trust by waste or mal-administration of the assets, (3 *Dana*, 392; 5 *Ib.*, 411,) does not apply to the action *supra*.—*Ib*..... 239

7. A creditor, before he can maintain his action against the sureties in the administrator's bond for a *devastavit*, must obtain a judgment against the personal representative establishing his debt and fixing upon him assets sufficient to discharge the debt, or a part of it; but a return of *nulla bona* on an execution issued thereon is not an essential prerequisite to such action.—*Ib*..... 240

8. Where a testator directs land to be sold by his two executors, and one of them vacates his office, the power to sell devolves on the other. (*Rev. Stat.*, chap. 37, art. 1, sec. 9.) If both remain in office, the power is joint, and both should execute the deed. (4 *Mon.*, 582.)—*Wells vs. Lewis*..... 269

9. The debts of a testator are to be paid, first out of the perishable goods, not specifically bequeathed, next out of the slaves, and if these be insufficient, then out of the real estate, where the will makes no provision for their payment.—*Broadwell vs. Broadwell*..... 290

Final Order—Forfeited Recognizance.

FINAL ORDER—

1. A final order either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such a manner as to put it out of the power of the courts making the order, after the expiration of the term, to place the parties in their original condition. (*15 B. Mon.*, 48.)—*Applegate vs. Applegate*.....236
2. An order of a county court refusing to qualify a person as a deputy sheriff on motion of the sheriff, is not a final order, and no appeal lies.—*Id.*.....236
See *Judgment*.

FIXTURES—

1. See the opinion in this case for a discussion of the question as to the rights to what are called fixtures; (1,) as between heir and executor; (2,) between the executor of a tenant for life and the remainder man or reversioner; (3,) between landlord and tenant; (4,) in respect to fixtures erected for the purposes of trade; (5,) between vendor and vendee, mortgagor and mortgagee.—*Johnson vs. Wieman*.....357
2. Upon the sale of the freehold, fixtures will pass in the absence of any express provision to the contrary.—*Id.*.....357
3. What will give chattles the character of fixtures and deprive them of that of personality? See opinion for a review of the authorities on this subject.—*Id.*.....357
4. In this case chandeliers or gas burners in a house are held to be fixtures.—*Id.*.....358

FORCEFUL ENTRY AND DETAINER—

1. The provisions of the Civil Code regulating proceedings in cases of forcible entry and detainer, (sections 500 to 518, inclusive,) are a substantial re-enactment of the act of 1810. (*Statute Law*, 715.)—*Belcher vs. Barret, &c.*.....307
2. The want of a judgment upon the verdict of a jury in the country, on a writ of forcible entry and detainer, is no ground for dismissing the traverse in the circuit court. Such judgment is not necessary to enable a party to maintain a traverse.—*Id.*.....307
3. In such case the truth of the inquisition in the country is the only matter involved in the issue to be tried by the jury in the circuit court.—*Id.*.....307
4. Upon an inquest in the country on a writ of forcible entry and detainer, the verdict of the jury, "the defendants not guilty," is sufficiently explicit and responsive to the inquiry submitted to them, and a traverse thereof may be brought. Strict technical precision and regularity not required in verdicts and proceedings under the statutes regulating this remedy.....307

FORFEITED RECOGNIZANCE—

1. A recognizance, entered into in October, 1860, was filed in the clerk's office in December, 1860. The case was before the grand jury at the term to which the defendant was recognised, who reported to the court that they had failed to indict; but the court failed to enter of record the discharge of the defendant and the exoneration of the bail. (*Crim. Code*, sec. 116.) In September, 1862, (no indictment in the meantime having been found, nor any other step taken towards the prosecution of the charge,) proceedings were taken to forfeit the recognizance. *Held*, That the circuit court properly dismissed the proceeding, the effect of which was to exonerate all the parties from liability on the recognizance—an order which, under the section *supra*, should have been made upon the failure of the grand jury to indict.—*Commonwealth vs. Roberts*.....219

Frauds, Statute of—Gaming.

2. In an action upon a forfeited recognizance the defendant must make a written statement of the facts constituting his defense. Without this the mere exhibition to the court of the evidence relied on by him, either to defeat or suspend the action, will be disregarded.—*Brown vs. Commonwealth*.....231
3. In such case the production of the respite of the Governor, not relied on by pleading, constitutes no defense to the action. The court is not authorized to take any judicial notice of the paper presented in that way.—*Id*.....231
4. That the Governor remits, not the forfeiture, but the judgment itself except as to "fees and costs," furnished no ground for setting aside the judgment so in part omitted.—*Id*.....231
5. The power of the circuit court to remit, in whole or in part, the penalty of a forfeited recognizance, is derived solely from section 94 of the Criminal Code, and is a judicial, not an arbitrary discretion, to be exercised upon consideration of the fact, relied upon in the defense. (1 Met., 333.)—*Commonwealth vs. Rowland*.....235
6. The fact that the defendant had been either surrendered or arrested must be alleged and shown in the defense, and is indispensable to the exercise of the discretion allowed by section 94, *supra*. And, *quere*, what additional fact or facts, (if any,) will be necessary to justify a remission in whole or in part of the penalty.—*Id*..235

FRAUDS—STATUTE OF—

1. A sale of standing trees, in contemplation of their immediate separation from the soil, by either the vendor or vendee, is a constructive severance of them, and they pass as chatties; and, consequently, the contract of sale is not embraced by the statute of frauds. (1 Green. Ev., sec. 271; 13 B. Mon., 349.) And this though no definite time be fixed for their removal.—*Byars vs. Reese*....372
2. The phrase, "in contemplation of immediate separation from the soil," is used to distinguish a sale of standing trees, or growing crops, which passes no interest in the land, except a license to enter upon it for the purpose of removing them, from a contract conferring an exclusive right to the land for a time for the purpose of making a profit out of the growth upon it.—*Id*....372
3. Where standing trees are sold as chatties, the selection and marking of them by the purchaser, with the knowledge and consent of the vendor, is a constructive delivery, and the title vests in the purchaser. But—
In such case, if one *bona fide* purchase the land for a valuable consideration paid, and acquire title thereto, before he had notice of the sale of the trees, he is entitled to them, and the purchaser of the trees must look to his vendor for damages. That he had notice before the trees were cut would be immaterial.—*Id*.....373

GAMING—

1. The second and fourth sections of chapter 42 of the Revised Statutes, (title GAMING,) secure to the loser and his creditor the right to sue for money or property lost at gaming, for five years, and the exclusive right to do so for six months, after which any other person may sue for its recovery within the five years; the one first suing to have the preference.—*Barnes vs. Turner*..114
2. If the loser or his creditor sues, the recovery will only be the amount lost, and be for the sole benefit of the party suing. If another sues, the recovery will be treble the amount lost and won, one-half to the use of the plaintiff, the other to the Commonwealth.—*Id*.....114
3. Although more than six months may have elapsed, the loser has the right to adjust the loss by private arrangement with the winner, if no other person has com-

General Assembly—Guaranty.

menced suit. If the transaction be made in good faith by both parties, and free from any device to evade the statute, both the winner and loser should be protected.—*Ib* 114

GENERAL ASSEMBLY—

A member of the legislature in attendance upon its session, is not privileged against being served with a summons in a civil action.—*Johnson vs. Offutt*..... 19

GIFTS—

1. Gifts *causa mortis* are in general conditional, like legacies, but it is absolutely essential to them that they be made by the donor in his last illness; or in contemplation or expectation of death.—*Knott's adm'r. vs. Hogan*..... 99

2. To make a valid gift, simply so called, or a gift *inter vivos*, it is essential that it should be irrevocable by the donor. (5 *Litt.*, 12; 5 *Mon.*, 170; 4 *B. Mon.*, 538.)—*Ib* 99

3. At the time a note for money loaned was executed, payable three years after date, the interest thereon to be paid annually, the payee executed and delivered to the payor, a writing stipulating that, if the payee should not collect the note in her lifetime, her representatives were directed to surrender it to the payor, "*as I intend it as a gift from me to him.*" The payee retained the note in her possession during her life, and died within less than a year after the execution of the writings. *Held*, That this is not a valid executed gift which a court of equity should enforce.—*Ib*..... 99

4. The writing *supra*, might, if established according to the requirements of the statute of wills, take effect as a testamentary disposition.—*Ib*..... 99

GUARANTY—

1. It is a general rule that if a person offers to pay money upon the performance of an act by another, the performance of the act by the latter, without any notice of his acceptance of the offer, or of his intention to act upon it, gives him a right to demand the money. But it is settled as an exception to that rule, that where the offer is to guaranty a debt for which another is primarily liable, in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor; but the creditor must notify the guarantor of his acceptance of the offer, or of his intention to act upon it. (2 *Amer. Lead. Cases*, pages 35 to 107; 7 *B. Mon.*, 5; 13 *Ib.*, 381; 14 *Ib.*, 184; 7 *Pet.*, 113.)—*Steadman vs. Guthrie* 148

2. That the guarantors might, by inquiry from the person in whose favor the guaranty was given, have learned what had passed between the guarantees and himself, will not dispense with notice. A person thus proposing to become surety for another is not bound to inquire as to the acceptance of his proposal—the creditor, who intends to hold him responsible for the debt of another, must show that he had reasonable notice of such intention.—*Ib*..... 148

3. When notice of the acceptance of an offer to guaranty is requisite, (in an action on such guaranty,) the allegation of notice in the petition should be special, and such as will enable the court to determine from its statements whether or not the notice was given as the law requires. (2 *Ala.*, 373; 3 *Conn.*, 438.) The general averment, "*of all which the defendants had notice,*" is not sufficient.—*Ib*..... 148

4. Plaintiff alleged in his petition, in substance, that public confidence in C., a banker, being greatly impaired, in consideration that the plaintiff and the other de-

Heirs and Devisees—Husband and Wife.

posalters would forbear to withdraw their deposits, and would permit C. to keep and use the same during the panic or until he could conveniently pay them, and to prevent a run upon him, and of sustaining his credit, the defendants signed and delivered to C., (the banker,) and published in the newspapers, the following instrument:

"Louisville, Oct. 1, 1857. We the undersigned agree to guaranty the depositors of W. E. C. in the payment in full of their demands against said C., on account of money deposited with him. We have entire confidence in his ability to meet all demands." That the paper was shown to plaintiff by C., and that accepting and relying upon the same, he, upon the faith of the guaranty, forbore to withdraw his money as he purposed to do, of all which defendants had due notice; and that C. failed and closed his banking house on the 5th of October, 1857. *Held*, (upon demurrer to the petition,) That the petition is fatally defective for want of special averment of reasonable notice to the guarantors of the plaintiff's acceptance of the offer, or of his intention to act upon it.—*Ib*.....148

See *Consideration*.

HEIRS AND DEVISEES—

1. Where lands are devised by a testator, and after his death a patent issues to him therefor, the legal title upon the issuing of the patent vests in his heirs, who hold the title thus acquired in trust for the benefit of the devisees under the will.—*Cobb vs. Stewart*.....255

2. In such case, in a suit by the devisees to recover the land, the heirs are necessary parties; and the action must be in equity.—*Ib*.....255

HUSBAND AND WIFE—

1. The release by a wife of her potential right of dower forms a valuable consideration, sufficient to sustain a settlement upon her by her husband, even against his creditors.—*Ward vs. Crotty, &c*..... 59

2. An agreement by a husband to transfer to his wife a note, for a part of the purchase money, for her separate use, in consideration of her release of her potential right of dower in land sold by him, is binding in equity, and may, upon her application, be specifically enforced against him.—*Ib*..... 59

3. A husband sold land in which his wife had a potential right of dower, which she refused to release unless he would give her one of the notes which he had taken from the purchaser. He agreed to assign the note to her for her separate use, and delivered it to her, endorsed, "I assign the within note to C. W., [the wife,] for satisfactory consideration." No trustee was named, nor was the assignment recorded. She then signed and acknowledged the deed. Afterwards his creditors sought to subject the note, when she asserted her claim thereto. *Held*, That against the subsequent creditors she is entitled to the note. Against the prior creditors she is entitled to the value of her potential right of dower at the time she released it, with interest; the residue, if any, due upon the note, to go to the prior creditors.—*Ib*... 59

4. In an action by husband and wife, and their assignee, upon two notes, one of which was executed to her, and the other to her and her husband jointly, and both reciting that they were given to secure the rent of a tract of land which had been assigned to her for dower in the estate of her former husband, who died in 1851, *held*, that the defendant cannot set up demands against the husband as a set off against the debts sued on.—*Green vs. Carson*..... 76

Husband and Wife.

5. The case of *Smith, &c. vs. Long, &c.*, (1 *Mct. Ky. Rep.*, 486,) merely decides that where a husband and wife had jointly executed a bond for the conveyance of land belonging to the wife, and had put the vendee in possession, she was not entitled in equity to recover of the vendee rent for the time he had occupied the land under the purchase.—*Id.*..... 76
6. Antenuptial executory contracts between husband and wife, to be performed during marriage, have been frequently enforced in equity, although void at law.—*Murman vs. Murman*..... 84
7. Conveyances from husband to wife, without a trustee, have been frequently supported in equity, although at law, as a general rule, executed as well as executory contracts between them, without a trustee, are void.—*Id.*..... 84
8. At law the husband is entitled to a note given to his wife by a stranger. Yet, where the purchaser of land executed a note payable to the vendor's wife, in pursuance of an agreement between the husband and wife, and in consideration of her releasing dower, her right to the note was sustained in equity.—*Id.*..... 84
9. A husband is legally entitled to his wife's earnings, but his agreement to give them to her has been held valid in equity.—*Id.*..... 84
10. Executory contracts between husband and wife, without the intervention of a trustee, have been held to be valid in equity. As a general rule, wherever a contract would be good at law, when made with trustees for the wife, that contract will be sustained in equity when made by husband and wife with each other without the intervention of trustees, if it does not affect the rights of third persons.—*Id.*..... 84
11. If, in consideration of a married woman conveying her land and slaves for her husband's benefit, he agrees to pay the value of her interest to a trustee for her separate use, the contract will be valid at law. If there is no trustee, her equitable right to the money will not be defeated, because whenever a separate use is created for a married woman, whether by her husband or by a stranger, whether by an executed or executory contract, equity will if necessary make her husband her trustee.—*Id.*..... 84
12. Nor is it necessary, in order to give her a right to the money for her separate use, that the notes of the husband to her should be so expressed. Though a stranger's conveyance of property or covenant to pay money to a married woman, or to a trustee for her, in order to give her a separate use, must contain words indicating such intention, such words are unnecessary in a husband's conveyance or covenant.—*Id.*..... 89
13. Sec. 2, art. 2, of chap. 47, of the *Revised Statutes*, which provides that husband and wife may sell and convey her chattel real, or slave, in the same mode as the land of the wife may be sold and conveyed, and that "the proceeds shall be his, unless otherwise expressly provided in the conveyance or the obligation of the purchaser" does not apply, nor is there any similar provision applying to a wife's real estate. But where the wife joins with the husband in selling her slaves in order to give him the proceeds, and for that consideration he gave her his note, such a provision is not necessary in order to give her an equitable claim on the husband for the value of the slaves in accordance with his agreement.—*Id.*..... 85
14. That the husband was dealt with and obtained credit upon the faith that the proceeds of land and slaves of the wife belonged to him, does not, so far as he and his representatives are concerned, constitute a defense against a recovery by her upon a note executed by him to her in consideration of her conveyance of the property for his benefit.—*Id.*..... 85

Husband and Wife—Indictment.

15. Nor does the fact that part of the proceeds of the property was used by the husband in paying store accounts contracted by her, and in purchasing a carriage for her and by her direction, constitute a defense against such recovery.—*Id.*..... 85
16. But, though a married woman is equitably entitled to have notes, which were executed by her husband to her in consideration of her conveyance of her land and slaves for his benefit, paid out of his estate, yet where her claim is a mere equity, and there is no legal demand to which she can be substituted, it cannot be enforced to the prejudice of her husband's creditors in a settlement of his insolvent estate.—*Id.*..... 85
17. Where the husband reduces to possession, without resort to a court of equity, an interest in an estate descended to the wife, consisting of cash, he acquires a complete legal right to it, and the wife has no equity to a settlement against his creditors seeking to subject property, (a slave,) purchased by the husband, and conveyed to a trustee for her benefit; even if he was induced to make the conveyance because he had received money which his wife derived by inheritance. It must be considered as a voluntary conveyance.—*Hurd v. Courtenay*.....140
18. See the opinion for a statement of facts, such as the condition of the husband's pecuniary affairs, &c., upon which it is held that a voluntary conveyance of a slave by a husband to a trustee, for the use and benefit of his wife, was fraudulent, and avoided the deed as to a subsequent creditor.140
19. A *feme covert*, having a vested right to a legacy, not due, her husband, upon her death, is equitably entitled thereto. (6 *Gill & John*, 507.) And, there being no demands against her estate, he may recover it from her administrator when due.—*Duncan v. Prentice*.....146
20. The provision of sec. 49 of the *Civil Code*, that where the action concerns the separate property of the wife, or where the action is between herself and her husband, she may sue alone, relates merely to the form of procedure, and confers no new right of action.—*Mason v. Mason*.....242
21. The only effect of the provision *supra* is to dispense with the necessity for the intervention of a next friend, where the action concerns the separate property of the wife or where she sues in equity to enforce some equitable right against the husband.—*Id.*.....242
22. The wife cannot sue the husband to recover possession of slaves devised to her as her separate property, free from the control of her husband, which he refuses to deliver to her; no other ground of relief, legal or equitable, being alleged.—*Id.*.....242
23. In such case the husband is regarded as the trustee of the wife, holding the legal title for her sole use. A court of equity would hold him accountable for any violation of his trust. But his mere possession of the slaves, nothing else appearing, is not sufficient to show such abuse.—*Id.*.....242
24. Although there are cases in which a court of equity will lend its aid in the adjustment of conflicting claims arising between husband and wife with respect to their property, yet is the policy of the law rather to restrict than to enlarge this class of cases. The necessity must be made clearly apparent.—*Id.*.....242

INDICTMENT—

See the opinion for a case in which the facts stated in an indictment for accepting a challenge to fight in single combat with deadly weapons, were held sufficient.—*Hefren v. Commonwealth*..... 5

Indorser—Infants.

INDORSER—

1. In an action against the indorser of a note, payable in one State and indorsed in another, the laws of which differ, the liability of the indorser depends upon the law of the place of indorsement, and not upon that of the State where it is payable, nor upon the *lex domicilii*.

2. The indorsement, by a citizen of Louisiana, made in Kentucky, upon a note payable to him in Louisiana, is governed by the law of Kentucky.—*Short, &c. vs. Tralus &c*299

INFANTS—

1. The statute authorizing the sale of the real estate of infants must be strictly complied with. The report of the commissioners appointed to appraise the estate of the infants, must be *full* and *explicit* on all the matters which, by the statute, they are required to ascertain and report to the court. Without this the court has no jurisdiction to decree a sale.—*Woodcock vs. Bowman*..... 40

2. Among other things the report of the commissioner must show "the *net value* of the real and personal estate, and the annual profits thereof." See the opinion for a report held insufficient in its statement of the value of the infants' estate, as well as in other respects. It must state the "*net value*."—*Id.*..... 40

3. An order appointing commissioners authorized them simply to "value the infants' real estate." It may well be questioned whether such defect in the order of appointment would be cured by a report subsequently made in conformity with the law and approved by the court—a point not decided.—*Id.*..... 40

4. In a proceeding for the sale of infants' real estate under the statute, the record must show that the commissioners, appointed to report the net value of the infants' estate, &c., were sworn; otherwise the court has no jurisdiction to order a sale, and the sale, if made, will be void.—*Watts vs Pond*..... 61

5. The report of the commissioners must show whether the interest of the infants requires the sale to be made, or the sale will be void. It will not be sufficient to state that in their opinion "it would redound to the benefit of the said infants to have said land sold."—*Id.*..... 62

6. Sec. 466 of the *Civil Code*, which provides for the sale of slaves and real estate descended or devised to the heirs or devisees of a decedent in an action for the settlement of his estate, where it appears that the personal estate is insufficient for the payment of debts, is limited, so far as it relates to the real estate of infant heirs and devisees, by sec. 539 of the *Code*.—*Gill vs Givins*..... 197

7. So much of the real estate of an infant heir or devisee, (under the sections *supra*,) as may be necessary to pay the debts of the ancestor or testator, may be sold in a proceeding to settle the decedent's estate; but if more than is necessary for that purpose be sold, except in the mode prescribed by the Revised Statutes, in chapter 86, the judgment ordering the sale, and the sale made thereunder, are void.....197

Where the heirs are adults, such judgment, though erroneous, would not be void.—*Id.*..... 197

8. *Quere.* Would an order for the sale of so much of the real estate, descended or devised to an infant, as might be necessary to pay a certain sum adjudged to be due to the decedent's creditors, be void, if erroneous as to the sum adjudged to be due?—*Id.*.....197

9. The statute which provides that no action shall be brought to charge any person upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy, unless the promise or ratification, or some

Insurance.

memorandum or note thereof, be in writing, &c., (*Rev. Stat., chap. 23, sec. 1*) applies to all cases in which the plaintiff relies upon a promise or ratification, such as the statute refers to, in support of his action, whether he declares upon it, or proves it to avoid the plea of infancy.—*Stern vs. Freeman*.....309

10. The statute *supra* applies to every express promise to pay a debt contracted during infancy; but not to an express promise to perform any other contract made during infancy, unless such promise is embraced by the word "ratification."—*Ib*.....309

11. A writing, showing that the defendant has performed an act of ratification, is as effective as one containing an express ratification.—*Ib*.....310

12. Where a writing, addressed to another than the plaintiff, is relied upon, not as constituting a ratification, or containing a promise; but, as evidence of a ratification previously made by the defendant, it is entitled to the same weight as if it had been addressed to the plaintiff.—*Ib*.....310

13. An infant purchased the interest of his partner in a mercantile concern, and gave his notes therefor. After coming of age, he retained possession of the property and dealt with it as his own; in his own name and for his own benefit conducting the business, selling the goods and collecting the debts which had belonged to the late firm. The facts inferred from a letter written by him to a creditor of the firm, as well as from the statements of his answer. *Held*, That these acts were a ratification of the purchase, and he must pay the notes given for the purchase money. (1 *Greenleaf*, 11; 8 *Ib.*, 405; 2 *Kent's Com.*, 253.)—*Ib*.....310

INSURANCE—

1. Where a condition of a policy of insurance requires the insured to deliver an account of their loss, with their oath or affirmation declaring the account to be true and just, &c., the affidavit of the insured is admissible to prove a compliance with such condition, but for no other purpose, and the court should so inform the jury.—*Phœnix Ins. Co. vs. Lawrence*..... 9

2. If a policy of insurance has ceased to have any effect, by reason of the insured having kept prohibited articles in the house, a promise by the insurer's agent, having authority to adjust and pay losses, with knowledge that the prohibited articles were kept in the house at the time of the fire, will not bind his principal.—*Ib*..... 9

3. A firm obtained insurance upon a storehouse and the stock of goods therein for a separate sum. The interest of the insured in the house was incorrectly described in the policy as belonging to the firm, whereas it was the property of one of its members. In a suit brought to recover for the loss of the goods—*Held*, in the absence of proof that the plaintiffs procured the insurance on the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods, that this does not vitiate the insurance on the goods.—*Ib*..... 9

4. The constructive possession of the sheriff by virtue of the levy of an execution upon goods which have been insured, where the insured retains the actual possession, does not vitiate the policy. Otherwise where a conveyance is made which terminates the interest of the insured in the goods.—*Ib*..... 9

5. Although a policy of insurance contains a clause prohibiting "any transfer of the interest of the insured by sale or otherwise," without the consent of the insurer, yet a deed made by the insured, conveying the goods to assignees in trust to pay creditors, will not render the policy void, the insured retaining the actual possession of the goods.—*Ib*.....in..... 9

Judgments—Landlord and Tenant.

6. If by the terms of a policy of insurance the keeping or storing of certain articles on the insured premises is prohibited during its continuance, and the policy only suspended whilst they are so used, the policy is not thereby rendered void.—*Id.*..... 9
7. The conditions and enumeration of hazards form parts of the policy, and if articles prohibited by the policy, (whether by provisions in the body of it or annexed to it,) are kept by the insured, the burden is not upon the insurer to show that the keeping thereof caused the loss or increased the risk. (1 *Phillips on Ins.*, sec. 866.) But the keeping of such articles by the insured, when the policy was obtained, did not render it void unless they concealed that fact from the insurer.—*Id.*..... 9
8. In an action against an insurer, the defendant, not being presumed to know what prohibited articles were kept by the plaintiff when the loss occurred, is not bound to specify them in his pleadings. But where he specifies some, without alleging that any others were kept, the jury should not be permitted to consider any except those specified.—*Id.*..... 9

JUDGMENTS—

1. A judgment cannot be final merely because it decides some question of law or fact, relating even to final relief, nor merely because it decides what are the rights of the parties as to such relief.—*Bondurant vs. Apperson*..... 30
2. A judgment to be final must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose without further action by the court or by process for contempt.—*Id.*..... 30
3. An order sustaining an attachment, made before final hearing, is not a final order, and is not the subject of an appeal. (*Bondurant vs. Apperson*, *supra*; *Civil Code*, secs. 285, 291, 292; 14 *B. Mon.*, 195.)—*Hanson vs. Bowyer*..... 108

JURIES—

1. The summoning of bystanders to serve as grand jurors, when properly ordered, is a duty in the performance of which the accused in a criminal case is entitled to the services of the sheriff, or coroner where there is no sheriff. If summoned by one specially appointed by the court, the indictment may be quashed. It is a substantial error. (*Crim. Code*, secs. 159, 98; *Rev. Stat.*, chap. 55; act of March 17, 1862, secs. acts, 95.)—*Commonwealth vs. Graddy*..... 223
2. Sec. 194 of the *Crim. Code*, which authorizes the court, for sufficient cause, to designate some other officer or person to summon jurors, relates only to petit jurors.—*Id.*..... 223
3. Where the grand jury is composed of jurors selected by commissioners, as directed by the Revised Statutes, the court say they incline to the opinion that the summoning of them by a person other than the sheriff or coroner would not be "a substantial error."—*Id.*..... 223

LANDLORD AND TENANT—

1. A defendant in a distress warrant, who executes the bond authorized by section 721 of the *Civil Code*, thereby admits that he is either tenant, assignee or under-tenant, and cannot, in a motion for judgment thereon, rely upon a defense which denies that character—as that he was but surety for the lessee, and that the lease was procured by fraud or mistake on the part of the lessor. The defenses allowed in such motion are prescribed in sec. 722 of the *Code*..... 240

Lien—Mechanics' Lien.

2. *Quere.* In the case *supra*, would not the party be entitled to relief in equity?—*Pegard vs Kellar*.....260

LIEN—

See *Mechanic's Lien. Notice. Mortgages.*

LIMITATIONS—

1. Mere lapse of fifteen years and a few days, without execution upon a judgment, does not raise a presumption of payment.—*Chiles & Thomas vs. Monroe*... 72

2. The title of an act, passed in 1858, is, "An act to amend the *second section* of article sixty-three, of the Revised Statutes, entitled 'limitation of actions and suits.'" The act declared "that the provisions of chapter sixty-three, of the Revised Statutes, shall extend to and embrace all cases in which the right of action accrued, whether before or after the Revised Statutes took effect, from and after the first day of August, 1859." *Held*, That the act, or so much of it as applies to any other subject than that expressed in the title, is unconstitutional, inoperative and void.—*Id.*..... 72

3. In September, 1839, a judgment was rendered, on which an execution soon afterwards issued, and was returned, "No property found." A second execution issued in July, 1844, which, in September following, was also returned, "No property found." No other step occurred until Oct. 8th, 1861, when a third execution was sued out, which the defendant moved to quash, relying upon presumption of payment and limitation. *Held*, That the facts do not raise a presumption of payment, and that at the time this proceeding was commenced, there was no statute of limitation in force applicable to the judgment on which the execution issued.—*Id.* 72

4. Where a borrower of money, at a usurious rate of interest, pays the principal and interest, which, on the same day, is loaned to him, in accordance with an agreement to that effect, the statute of limitation against the recovery of the usury so paid begins to run. But if the period of limitation is not complete when the lender sues the borrower upon the note given in renewal, the latter may use the usury so paid as a set-off, although at the time of filing his answer the period of limitation had elapsed. The limitation ceased at the commencement of the suit.—*Hayes vs Goodwin* 80

5. To authorize a set-off there must be mutual subsisting demands constituting causes of action at the commencement of the suit; and limitation ceases against a set-off at the commencement of the suit.—*Id.*..... 80

6. The act of March 15, 1862, by which, after thirty days, the limitations of actions, contained in chap 63 of the Revised Statutes, should extend to and embrace all cases, whether the right of action accrued before or after the Revised Statutes took effect, is unconstitutional and void.—*Berry, etc. vs. Ransdall*..... 293

MANDAMUS—

Mandamus is an appropriate remedy whereby the county court may be compelled to show cause why they refuse to approve and qualify a deputy appointed by the sheriff. (*3 B. Men.*, 198.) From the judgment of the circuit court, in such proceedings, an appeal lies to the Court of Appeals.—*Applegate vs. Applegate*... 226

MECHANIC'S LIEN—

1. Debts, owing to mechanics for the construction or repairing of houses in the city of Louisville, are favored by the law, and a preference is given to them over other debts of the owners of the property, to the extent of the value of the property

Mortgages—Notice.

- improved which has not been previously incumbered.—*Brown vs. Story's adm'r*...316
2. The lien of a mechanic upon a house constructed by him in the city of Louisville, for the amount due him therefor, is an incumbrance upon it within the meaning of chap. 36, art. 15, of the Rev. Statutes.—*Id*.....316
3. Where such lien exists, and an execution is levied upon the property, the purchaser, at the sale made under it, and his vendee, only acquire a lien thereon for the purchase money and interest after the rate of ten per centum per annum from the day of sale till paid. That the property was not levied upon and sold as incumbered property, and that, after the sale, the purchaser removes the incumbrance which was upon it, will not give him an absolute title.—*Id*.....316
4. Other creditors may, before the purchaser has by writ removed the incumbrance, bring suit to subject the incumbered property. (*Rev. Statutes, sec. 2, art. 15, chap. 36.*) But, where the purchaser under the execution has otherwise removed the prior incumbrance, and sold the property before the suit was brought, the sale may be permitted to stand, and a personal judgment be rendered against him.—*Id*.....316

MORTGAGES—

1. It is well settled in equity, with reference to debts secured by mortgage, that the debt is the principal thing and the mortgage a mere incident thereto; that a transfer of the debt passes the mortgagee's interest in the mortgage property; and that his transfer of the mortgage, without the debt, passes nothing. (*5 New Hamp., 420; 2 Cowen, 195; 19 John., 325.—Willis, &c. vs. Vallette*.....187 ✓)
2. *Quere.* Does the term "income bond" import anything more than a bond payable out of income? And does a bond of a railroad company, payable out of its income, and without other words importing a pledge of its income or property, give a lien thereon?—*Id*.....187
- See Notice. *Railroad Companies.*

NEW TRIAL—

- Facts before the court at the time of the original trial furnish no ground for a new trial, even if the decision upon them has been erroneous.—*Willis, &c. vs. Vallette*.....187

NOTICE—

1. There is no distinction, as to the notice necessary to bind a purchaser, between cases which do not come within the operation of the registry acts and those which do.—*Willis, &c. vs. Vallette*.....186
2. Implied or presumptive notice may be equally effectual with direct and positive notice; but then it must not be that notice which is barely sufficient to put a party upon inquiry. Suspicion of notice is not sufficient. The inference of a fraudulent intent affecting the conscience must be founded on clear and strong circumstances in the absence of actual notice. The inference must be necessary and unquestionable.—*Id*.....186
3. The general doctrine is, that whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding.—*Id*.....186
4. Where the party has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected, he is bound with constructive notice of facts and instruments, to a knowledge of which he would have been led by an

Obligation.

- inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice. The proposition of law upon which this class of cases proceeds is, not that he had notice of a fact or instrument, which, in truth, related to the subject in dispute, without his knowing that such was the case, but that he had actual notice that it did so relate.—*Id.*.....186
5. Constructive notice is established where there is satisfactory evidence that the party had designedly abstained from inquiry for the very purpose of avoiding notice. Not that he had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge.—*Id.*.....186
6. If there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestae* would suggest to a prudent mind—if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser—there the doctrine of constructive notice will not apply; but the purchaser will in equity be considered a *bona fide* purchaser without notice.—*Id.*.....186
7. A purchaser is legally chargeable with notice of an unrecorded lien, though he have no knowledge of its existence, if he have notice, actual or constructive, of the contents of the instrument giving the lien, though, under a mistake of the law, he may have supposed there was no lien.—*Id.*.....186
8. An agent is only chargeable with constructive notice of those facts which he would have been led to a knowledge of by performing his duty according to the regular course of business.—*Id.*.....187
9. The general rule is, that a purchaser without notice is not affected by notice to his vendor. This rule applies in favor of a purchaser of a bond secured by mortgage, (without a transfer of the mortgage,) from one who had notice of a prior incumbrance.—*Id.*.....187
10. Notice to an agent of the purchaser is constructive notice to the principal, and notice to the trustee is notice to the beneficiary. The notice must, however, be in the course of the transaction in which he is acting on behalf of the principal—otherwise it will have no legal or necessary connection with the latter. So, notice to a trustee, made long before the execution or contemplation of a mortgage to him, of a prior incumbrance, will not affect the *custui que trust*. (2 *Lead. Eq. Cases, Amer. Ed.*, 106, 116-17.)—*Id.*.....187
11. See the opinion for a statement of facts held insufficient to show that a subsequent holder under a recorded mortgage had either actual or implied notice of a prior incumbrance upon the property.—*Id.*.....187

OBLIGATION—

1. A note signed "John B. Lewis, trustee for Ann R. Talbott," and containing the same recital in the body of the instrument, purports *prima facie* to have been executed by him as trustee.—*Lewis vs. Harris*.....358
2. The question concerning the intention with which a party executed a note—whether to bind himself or as trustee for another—is a question of law, to be decided by the court, in view of the language of the note, the circumstances under which it was executed, and the situation of the parties. An allegation concerning the intention is an allegation of a legal implication, and no denial is necessary.—*Id.*.....358
3. A note given, "we or either of us, directors of Centreville and Jacksonville Turnpike Co., promise to pay," &c., is the individual obligation of those who signed. It is not the obligation of the corporation.—*Whitney vs. Sudduth*.....296
- See *Contracts*.

Occupying Claimant—Parties.

OCCUPYING CLAIMANT—

1. An occupant of land, to be entitled to pay for his improvements, under the occupying claimant law, should deduce a title from the Commonwealth. He need not show a valid title. He must show that he believed himself to be the owner of the land by reason of a claim, in law or equity, founded upon a grant from the Commonwealth; and, in order to do so, must connect himself with the grant by showing that he held the title which it granted. (*Revised Statutes, chap. 70, sec. 1; 4 Bibb, 461; 2 A. K. M., 214.*)—*Fairbairn vs. Means*.....323
2. The statute *supra* does not make the right of a claimant depend upon his belief concerning his title.—*Id.*.....323
3. That the occupant holds under those claiming under a deed from the sheriff, made in pursuance of an unauthorised sale of the land for taxes alleged to be due from a patentee, does not make him an occupying claimant within the meaning of the statute.—*Id.*.....323

ONUS PROBANDI—

When the law presumes *prima facie* that an act was done with a certain intention, a denial of such intention is unavailing; the facts relied on to destroy the presumption must be stated. Thus, where a purchaser of land, at the time he gave his notes therefor, executed a paper stating that he expected to pay the notes at maturity, and had no off-sets, and would have none against them, a denial by him that he executed them for the purpose of enabling the vendor to sell them, is insufficient to throw upon an assignee of the vendor, in a suit upon the notes, the burthen of proving such intention; but the defendant should show for what purpose they were executed.—*Wells vs. Lewis*.....260

PARTIES—

1. The effect of sec. 33 of the *Civil Code*, as far as it relates to trustees, is to enable them to sue, as they could have done before the Code, without joining the beneficiaries in the action. (3 *Met.*, 509.) But, under the old practice, a trustee, under a mortgage made to secure the payment of money to others, could not sue for a foreclosure and sale without making the *cestui que trust* parties, (*Story's Eq. Pl.*, sec. 201,) and the Code does not give him the right to do so.—*Bardtown & Lou. Railroad vs. Metcalfe*199
2. Under sec. 37, of the *Civil Code*, one person may sue for the benefit of others, (1,) where the plaintiff has a common or general interest with many others; (2,) where the persons interested, but not having a common or general interest, are numerous and it is impracticable to bring them all before the court within a reasonable time.—*Id.*.....199
3. A trustee, to whom a mortgage is made by a railroad company for the benefit of bond holders, and who has no interest except as trustee, is not authorised, by section 37, *supra*, to bring an action in his own name for its foreclosure; but, where the mortgage makes it his duty to sue, he may do so, without making the bond holders parties, upon showing that they are numerous, and that it is impracticable to bring them before the court within a reasonable time.—*Id.*199
4. In such case, where the suit is properly brought by the trustee, without making the bond holders parties, it is error to give him a judgment for the money. The court should retain control over it for the benefit of those entitled to it.—*Id.*.....199
5. In an action by one of the depositors of a banker against the defendants, upon an alleged agreement by them to guaranty the depositors of such banker in the pay-

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ment in full of their demands against him on account of money deposited with him—the plaintiff alone being entitled to the money claimed by him—the other depositors, having no interest in it nor in the action, are not necessary parties.—*Steadman vs. Guthrie*..... 147

6. Even if the acceptance of the guaranty by the other depositors was necessary to render it obligatory in favor of the plaintiff, that fact did not make them necessary parties to the action.—*Id.*..... 147

7. In an action by the holder of one of the notes given for the purchase money of a tract of land, to enforce the vendor's lien, all the incumbrances or holders of the notes are necessary parties. They may assert their liens in their answers, where they are defendants; and service of process upon such answers is not necessary. In such case formal interpleading is not necessary.—*Jenkins vs. Smith*..... 280

PASSWAY—

The order awarding a writ of *ad quod damnum*, upon an application to establish a private passway, must name the day on which the inquest is to be held, which must also be inserted in the writ—and the omission is fatal error. (*Rev. Stat.*, chap. 84, art. 1, sec. 7; 2 *Rev. Stat.*, page 299; 3 *Mon.*, 50.)—*Troutman vs. Barnes*... 257

PRACTICE IN COURT OF APPEALS—

The court of appeals will not reverse a judgment on account of the error of the circuit court in refusing, on motion, to strike out irrelevant or redundant matter in a pleading, if it do not appear that the appellant was prejudiced thereby. (*Civil Code*, secs. 147, 161.)—*Buckles vs. Lambert*..... 284

PRACTICE AND PLEADING—

IN CIVIL CASES—

1. A reply to a counter-claim or set-off may contain any matter of avoidance which might, under the former system of pleading, have been set forth by replication, provided it is not inconsistent with the petition —*Barbarous vs. Barker*... 47

2. When a reply contains matter inconsistent with the petition, the defendant should object to the filing of it, or move to strike out the inconsistent matter. If he fail to do so he cannot raise the objection in the court of appeals —*Id.*..... 47

3. If an answer presents merely matter of *defense*, it cannot be treated as a set-off or counter-claim, though it may be so called by the defendant.—*True, &c. vs. Triplett*..... 87

4. Objection founded on technical rules of practice waived where the conduct of the party entitled to insist on it has been such as to induce his adversary to believe, and to act upon the belief, that the objection had been abandoned.—*Meador vs. Turpin*..... 93

5. Where instructions found in the record are not embraced in any bill of exceptions, nor otherwise shown what instructions, if any, were given or refused by the circuit court, such instructions complained of constitute no part of the record, and cannot be noticed by the court of appeals.—*Id.*..... 93

6. After the issue formed by the petition and answer has been submitted to the jury; who, upon the evidence introduced by both parties, rendered a verdict for the plaintiff, it is too late for the defendant to move to dismiss the petition upon the ground that it had not been verified.—*Id.*..... 96

7. A defendant is not required to *denominate* his answer a counter-claim when the facts as presented constitute a cause of action against the plaintiff, arising out of the

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transaction set forth in the petition, &c., "with an appropriate prayer for relief." But it must contain all the requisites of a petition founded on the same cause of action.—*Hutchings vs. Moore* 110

8. A defendant, sued for compensation for surplus in a tract of land purchased of the plaintiff by the acre, states in his answer that he "has not enough knowledge or information to constitute a belief whether there is $11\frac{1}{2}$ acres of surplus land, above the 160 acres, and denies that he is indebted" on account of said surplus, &c. Held equivalent to a denial of "any knowledge or information thereof sufficient to form a belief." (*Civil Code, sec. 125.*)—*Id.* 111

9. Where no motion was made in the court below to correct a clerical misprison, it cannot be complained of in the court of appeal.—*Duncan vs. Wickliffe* 118

10. Sections 111 to 114, inclusive, of the Civil Code, which relate to the joinder of actions, refer to causes of action existing at the time of the commencement of the suit, and not to such as arise subsequently.—*Taylor vs. Moran* 127

11. Sections 159 to 162, inclusive, of the Civil Code, relating to amendments, authorize such as relate to the case actually in court, and not such as constitute an entirely new and distinct case. The facts alleged must be "material to the case," which serve to explain or perfect the cause of action originally stated, and not such subsequently occurring facts as form a separate ground of action, having no connection with the original cause of action, and not necessary to enable the party to recover on it.—*Id.* 127

12. A demurrer to the answer brings the whole of the pleadings before the court, and, in deciding upon the demurrer, it is the duty of the court to decide against the party who committed the first fault. (5 Mon., 528; 3 Mar., 322.) If the petition is insufficient, it must be so adjudged.—*Young, &c. vs. Duhme & Co.* 239

13. In a proceeding by motion against a sheriff and his sureties for the recovery of money collected by him on execution, if the motion is not made in court, nor entered on the motion docket, on the day specified in the notice, the motion shall be considered as abandoned. (*Civil Code, sec. 482.*) And a judgment subsequently rendered is a nullity.—*Foster vs. Wade* 252

14. Notice of a motion against a sheriff was given for the fourth day of the next term. On the third day of the term this order was made: "Notice filed and ordered to lie over." No further steps were taken at that term. At a subsequent term the plaintiff "renewed his motion for judgment which is ordered to lie over;" and, at the same term, judgment was rendered by default. Held, That there was no motion pending, and that the judgment was void.—*Id.* 252

15. Where the cause of action, prosecuted by ordinary proceedings, is exclusively of equitable jurisdiction, it is the duty of the plaintiff to amend his pleadings and move the court to transfer the action to the proper docket. (*Civil Code, section 7.*)—*Gobb vs. Stewart* 255

16. To avail himself of the error of the circuit court in overruling his motion to require the plaintiff to verify the petition, by affidavit, the defendant should, at the time, except to the decision of the court.—*Id.* 255

17. Allegation of a legal conclusion, deduced by the plaintiff from facts alleged in his pleadings, is not a material allegation.—*Steadman vs. Guthrie* 148

18. Where partners sue to recover a debt, one of them cannot, pending the action transfer his interest to his co-plaintiffs and become a witness for them, by having his name stricken from the action as plaintiff and theirs substituted. Section 32 of the Civil Code does not authorize it.—*Dougherty vs. Smith, Wilson & Co.* 279

19. Where the cause of action is transferred, pending the suit, and the name of the

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- assignee substituted for that of the plaintiff, security should be given for the past as well as future costs.—*Id.*.....279
20. A statement in an answer that, at the time of the execution of the note sued on, the defendant was an infant under the age of 21 years, is sufficient. It is not necessary to aver that the note was voidable.—*Stern vs. Freeman*.....309
21. Where the plea of infancy is relied on in the defendant's answer to a suit upon a note, the plaintiff has a right to prove a ratification of the contract, without averring it in his pleadings. See opinion for a discussion of the question and reference to authorities.—*Id.*.....309
22. Section 106 of the Civil Code, which provides that every action, except those enumerated in the previous sections, "may be brought in any county in which the defendant, or one of several defendants, resides or is summoned," does not change materially the former law on the same subject. It does not authorize judgment by default against a defendant served in another county, except where the cause of action is local, or where it affects himself and another served in the county where the action is brought.—*Randall vs. Shropshire*327
23. An objection to the misjoinder of causes of action is waived unless taken in the manner prescribed by the Civil Code; yet such misjoinder cannot have the effect to give the circuit court jurisdiction over a claim improperly joined against a defendant served in another county, and to render judgment by default against him, although the other defendant is served in the county where the action is brought.—*Id.*.....327
24. The decision in *Waller, &c. vs. Martin*, (17 B. Mon., 188,) that, in an action *ex delicto* against several defendants, some of whom were, and some of whom were not, summoned, there could be a trial as to the former, and judgment against them, without any disposition of the case as to the latter, is, in effect, overruled by the decision in *Hedger vs. Downs*, (2 Met., 160.) This ruling does not apply where all are summoned. (Civil Code, sec. 402.)—*Buckles vs. Lambert*.....330
25. If several persons jointly commit a tort the plaintiff, in general, has his election to sue all or some of the parties jointly, or one of them separately. This rule has not been changed by the Civil Code.—*Id.*.....330
26. Where no attorney is appointed to defend for a non-resident defendant, not summoned and who does not appear, the judgment against him is erroneous. (Civil Code, sec. 440; 14 B. Mon., 272.)—*Allen vs. Brown*342
27. In an action against a non-resident defendant, not summoned and who does not appear, if the bond, required by section 440 of the Civil Code, is not executed, the judgment against him is erroneous. (14 B. Mon., 272; 1 Met., 649.)—*Id.*342
28. The prosecution of an appeal by a non-resident defendant, not summoned and who did not appear, is an appearance to the action. Upon a reversal and return of the cause, for failure to have a warning order, bond executed, or an attorney appointed, those steps will not be necessary, but the defendant may make defense by answer or demurrer. (1 Met., 649.)—*Id.*.....342
29. A paper containing written evidence of the contract declared on, although in the record, cannot be considered, if it be not referred to in the petition.—*Byassee vs. Reese*.....372
30. If the petition does not aver that the contract declared on was in writing, nor refer to any writing, it must be assumed that it was a verbal contract. (15 B. Mon., 443; 3 Met., 474.)—*Id.*.....372
31. In an action by the holder of one of the notes given for the purchase money of a tract of land, to enforce the vendor's lien, all the incumbrances or holders of the

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- notes are necessary parties. They may assert their liens in their answers, where they are defendants; and service of process upon such answers is not necessary. In such cases formal interpleading is not necessary.—*Jenkins vs. Smith* 381
32. The act authorizing cross-petitions, and process to issue thereon, as between co-defendants, does not affect the principles applicable to the case *supra*.—*Id.* 380
33. A writing purporting to have been executed by the defendant, referred to in and filed with plaintiff's reply to his answer and cross-petition, may be read as genuine against him, unless he denies its genuineness by affidavit before the trial is begun. (*Civil Code*, sec. 588.)—*Wells vs. Lewis* 260
34. In an action upon a covenant to furnish a slave with winter and summer clothing, an averment that the defendant had "failed to clothe said slave properly," is not a sufficient assignment of the breach. In such case, judgment by default for the plaintiff will be reversed.—*Skillman vs. Muir's adm'r.* 283
35. In an action for damages for breach of covenant, the plaintiff must prove their value. Thus, in an action for failing to furnish a slave the clothing stipulated, an averment that it was reasonably worth a certain sum, must be supported by proof. It is error to render judgment by default without such proof.—*Id.* 283
36. Where, upon the facts stated in the petition, there is an implied assumpsit to pay the amount claimed by the plaintiff, the allegation of value need not be proved upon failure of the defendant to counteract it. (15 *B. Mon.*, 628; 18 *Id.*, 60.) Otherwise, where there is no assumpsit, express or implied, to pay the sum claimed. (14 *B. Mon.*, 393; 18 *Id.*, 216; 1 *Met.*, 558; 3 *Met.*, 196.)—*Id.* 283
37. The Civil Code requires only a statement of the facts constituting the cause of action. What the law implies need not be averred. (Secs. 118, 144.)—*Id.* 283

PUBLIC DEBTORS—

1. The liability of the city of Louisville to the Commonwealth for the \$2,000 per annum required by the act of March 10, 1856, to be paid into the treasury, in consideration of the fines and forfeitures recovered in favor of the Commonwealth in the city court of Louisville, is that of a debtor to the Commonwealth, not that of a collector or receiver of public moneys; and judgment cannot be obtained therefor without notice of the motion.—*Louisville vs. Commonwealth* 63
2. Sec. 1, of art. 12, chap. 83, of the *Revised Statutes*, has been superceded by the provisions of the Civil Code, which prescribes the remedies against defaulting collectors and receivers of the public moneys.—*Id.* 63
3. See the opinion for a reference to the laws relating to the questions *supra*.—*Id.* 63

RAILROAD COMPANIES—

1. A railroad company, authorized by its charter to borrow money on its credit, necessary to complete the road, but not expressly authorized to make a mortgage upon its property or franchises to secure the bonds issued therefor, has an implied power to do so; though it cannot mortgage its corporate existence or any prerogative franchise conferred upon it. But, the right to build and use a railroad is not a prerogative franchise. A purchaser under its mortgage would take the road, subject to the terms of the charter designed to protect the public, and would be bound thereby as fully as the corporation.—*Bardstown & Louisville Railroad Company vs. Metcalfe* 199
2. A mortgage by a railroad company, to secure money borrowed for the construction of its road, is not opposed to the public policy of this State. This is indicated by the general course of legislation here upon the subject.—*Id.* 199

 Separate Estate.

3. That a railroad company voluntarily mortgaged its property to secure the money which it was expressly authorized by its charter to borrow, and that its bond holders invested their money upon the faith of the mortgage, relieves the case from the operation of the decision in *Vimont vs. Winchester & Lexington Turnpike Co.*, (5 B. Mon., 1.) If that decision can be regarded as denying that property or franchises, in the use of which the public have an interest, can be assigned, the court would hesitate to follow it in view of other decisions. (4 Litt., 160; 2 J. J. Mar., 227; 1 Dana, 261.)—*Id* 199

4. The mortgage of a "railroad with all its rights and privileges is authorized under a resolution of its board of directors, which authorized a mortgage of 'the road and its property, &c.'" As there was nothing to which the phrase "&c.," could have been designed to apply, except the franchises, it must be regarded as having been used to embrace them.—*Id* 199

5. An authority to mortgage a railroad and its property must design a transfer of the right to operate the road.—*Id* 199

6. In a suit to foreclose a mortgage upon a railroad and its franchises, (which authorized a sale upon failure to pay either the interest or principal, to satisfy the amount claimed and due, but contained no provision that the principal should become due upon failure to pay interest, and the principal is not due,) the bond holders have a right to a sale for the interest due. If the property was divisible, a sale should be ordered of so much as might satisfy the amount due. If not susceptible of division it must be sold or leased as an entirety. (2 B. Mon., 208-9; 5 Paige, C. R., 40; 1 Ala. R. N. S., 393.)—*Id* 199

7. In such case, where the property is worth much more than the amount of the debt and interest, it should be leased by public auction for the shortest term that will bring the amount due, and the accruing interest and principal as the same shall become due. If no one will take it for a term of years, then to be sold absolutely; the company to elect whether the property should be first offered for a term of years.—*Id* 199

8. In such case, the lessee or purchaser to give bonds with good security personal or real, for the purchase money, including the accruing interest and principal of the mortgage bonds; a lien on the property, or term, to be reserved as additional security. If leased, the lessee to give a covenant, with good security, to keep in good repair the road, cars, and other property, not consumable by use, (such as fuel and oil,) and to return the same to the company at the end of the term in as good condition as when received. The court, before ordering a lease, to cause an inventory to be made of the property, its value, condition, &c., to be filed, and declared in the decree conclusive evidence of its condition and value at the time of the lease.—*Id*... 199

SEPARATE ESTATE—

1. In 1857 a married woman, being the owner of land, not her separate estate, joined her husband in selling it, and made provision in the conveyance that the proceeds should be invested in other property for her separate use. A part of the proceeds were invested in slaves, which were conveyed to a trustee for her separate use. *Held*, That the slaves cannot be subjected to the payment of an account against her for goods sold to her upon the faith and credit of her separate estate.—*Hanly vs. Downing* 95

2. A separate estate, whether created before or since the statute, (*Rev. Stat.*, chap. 47, art. 4, sec. 17,) cannot be charged in equity for any debt contracted by a married woman. (18 B. Mon., 301; 3 Met., 244.)—*Id*..... 95

Set-off.

3. Where it was agreed by an antenuptial contract between husband and wife, that she might hold her estate for her separate use, the statute *supra* was held not to apply. (*Stites vs. Bryan, Mass. Opin.*, 1858.) So where the property is secured to the wife's separate use by post-nuptial settlement. *Argu.—Id.*..... 96
4. The statute *supra* prohibits the sale by a married woman of her separate estate, purchased with the proceeds of her inheritance, although the conveyance to her gave her power to dispose of it as if she were an unmarried woman. (17 B. Mon., 55.)—*Id.*..... 96
5. A decree for the sale of land, held in trust for the separate use of a married woman, is rendered void by a failure to have a report of commissioners stating the value of her estate, the annual profits thereof, and that her interest requires the sale to be made.—*Radford vs. Chamberlain* 237
6. The statute which prohibits married women from directly or indirectly creating any charge or incumbrance upon their separate estates, does not affect the rights and powers of their trustees with reference to such estates. It speaks only of alienations by married women.—*Lewis vs. Harris*.....363
7. Before the statute the trustees of a separate estate could not sell it except upon an express power of sale, nor could he create any charge upon it except for purposes authorized by the creator of the trust or approved by courts of equity. These rights and powers are not affected by the statute *supra*.—*Id.*..... 363
8. It is equitable that trust property, conveyed to the trustee for the separate use of a married woman, and for which he executed his notes as trustee, should be subjected for the purchase money. Had he paid the debt with his own money he would have held an equitable lien for his reimbursement. By the execution of the note he substitutes the creditor to this equitable lien, and thus creates a charge upon the property for the payment of the debt.—*Id.*.....363

SET OFF—

1. Two persons, mutually indebted to each other, executed each to the other his notes of hand for the full amount of their respective indebtedness, with the understanding between them that the notes might be used to pay precedent debts, or for raising money by negotiation. One of the payees assigned one of the notes, and failed. In a suit by the assignee against the payor he pleaded a note of the same date executed to him by the assignor, as a set-off. *Held*, That the set-off cannot be allowed.—*Barbaroux vs. Barker*..... 47
2. In such case the payor is bound, because his plea of a want or failure of consideration would be a fraud upon the holder. The principle applies to every case in which the note has been given to enable the payee to raise money or pay his debts. The fact that the payor had some additional motive for giving the note, concerning which he has been disappointed, cannot justify him in defrauding the holder.—*Id.*..... 47
3. Courts of equity would always entertain jurisdiction in cases of set-off, where the demands were connected, or where the one sought to be set off formed the consideration of the other.—*Taylor, &c. vs. Stowell, &c.*.....175
4. The only exception to the rule, *supra*, was, that if the claim proposed to be set off was for unliquidated damages, the chancellor would not, on account of the mere connection between the demands, first liquidate the damages, and then make the set off, where there was a plain and adequate remedy at law. But—

Where the existence of any extraneous fact is shown, calculated to defeat or impair the efficacy of the legal remedy, such as the insolvency or non-residence of the

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- plaintiff or his assignor, the jurisdiction of the chancellor, even in cases of unliquidated demands, was unquestionable.—*Id*175
5. The law on the subject, *supra*, has not been changed by the Civil Code. (2 *Met. Ky. Rep.*, 143.)—*Id*175
6. A demand for unliquidated damages, for breach of warranty of the quality of a commodity for which the note sued on was given, may be relied upon as an equitable set off against the note, when the vendor is insolvent or non-resident, even where the note is in the hands of, and the action upon it brought by, a remote assignee of the vendor.—*Id*17
7. *Queré.* Does the defense, *supra*, amount to a valid counter-claim in an action by the assignee of the note?—*Id*.....175
8. Objection for want of necessary party to an answer containing a set off must be taken in one of the modes prescribed by the Civil Code, (*sec.* 123—) otherwise, it is waived.—*Id*.....175
9. Every material allegation of new matter in an answer, relating to the set off therein relied on, where there is no reply, must be taken as true.—*Id*.....175

SHERIFF—

1. Notice of a motion against a sheriff and his sureties, for failing to pay a county creditor a claim due him, must—where the claim is ordered to be paid by the court after the county levy for the year has been imposed—aver that there was in the hands of the sheriff a sufficient sum to pay the claim, after deducting the previously allowed claims. But it is not necessary, when the claim is ordered to be paid at the time the county levy for the year is imposed, to aver that the sheriff had collected a sufficient sum to pay it and all other claims allowed at the same time.—*Thompson vs. Healy*.....257
2. The imposition of the county levy, and the delivery to the sheriff of the lists of the persons chargeable therewith and of the debtors and creditors of the county, as required by law, render him *prima facie* liable, on the 1st of October, to those whose claims were ordered to be paid at the time the levy was imposed.—*Id*.....257
3. On the trial of a motion against the sheriff and his securities for failing to pay a county creditor a claim due him, the record, containing the list of claims, may be read in evidence, and it may be proved by the clerk that he delivered a copy thereof to the sheriff, without producing the list delivered to him.—*Id*.....257
4. In such proceeding, the plaintiff must aver in his notice and prove every fact necessary to show that the sheriff is liable. (18 *B. Mon.*, 621; 3 *Met.*, 347.) It must be averred that the clerk had delivered to the sheriff a list of the persons chargeable with the payment of county levy, and the sum to be paid by each, and a list of the sums due, and from whom due, to the county.—*Id*.....257
5. In such case, also, a demand upon the sheriff is necessary—a demand upon the deputy is not sufficient. But—
6. If no demand can be made upon the sheriff, the creditor can recover from his sureties the debt, without damages, in an ordinary action, upon showing that the sheriff collected or might, with due diligence, have collected a sufficient sum to pay the county creditors. *Argu.*—*Id*.....257

SLANDER—

1. Slanderous words, of similar import with those declared on, spoken after the commencement of the action, cannot be relied upon in such action either as a distinct ground of recovery, or to show that the words charged had been spoken, or to

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enhance the damages to which the plaintiff may be entitled on the original cause of action, but simply and merely to show the *intent* with which the words charged were spoken, and, when given in evidence, the court should give such cautionary directions to the jury as to restrict their effect upon the verdict within the legitimate purpose of their admission.—*Taylor vs. Moran*127

2. In an action of slander, words spoken pending the action, and set up in an amended petition, were admitted in evidence without objection or any admonition to the jury as to the weight or effect they were to give to them; the court instructed the jury that the plaintiff had a right to recover, as well for slanderous words spoken after as before the action was brought, and that in determining the amount of damages they were to consider *all the facts and circumstances proven in the case*; the case was submitted to the jury and argued by counsel, after which the court said to the jury, in another instruction, that the plaintiff could not recover in this action for words uttered since the filing of the original petition, but that evidence thereof was admissible on the question of malice, and that they could not regard the words as *substantive slanders*, for which they might give damages in the action. *Held*, That the error was not cured by this caution. It should have been full and explicit as to the purpose for which alone the evidence was admissible, embracing specifically the idea that such evidence could not be considered by them to increase the damages.—*Id.*127

3. The specific words in which the slander is conveyed must be set forth in the petition, and it is not sufficient to state merely the *effect* of the words uttered, or that the defendant charged the plaintiff with the commission of a particular crime.—*Id.*127

4. The rule of evidence in actions of slander formerly was that the plaintiff must prove the precise words. That rule has been no further relaxed than to admit proof of the substance of the words. It is not enough to prove words of the same effect or import, or conveying the same idea. The words must be substantially the same words, and it is not sufficient that they contain substantially the same *charge*, but in different phraseology; equivalent words of slander will not do.—*Id.* 127

5. While the proof of speaking the words is for the jury, the correspondence between the words spoken and laid is for the court.—*Id.*127

STATUTES—

Mere change of phraseology in revising the statutes not a sufficient reason to believe that the legislature intended to change the law. (1 *Met.*, 621.)—*Johnson vs. Offutt*..... 19

SURETIES—

1. If one sign a note as surety, to be obligatory upon him upon the condition two others, who are named, should sign it as his co-sureties, and the note is left with his principal to procure the names of the other sureties to be signed to it, and, if the facts are known to the payee at the time the note is delivered to him, if the condition be not complied with the note will not be obligatory upon the surety. (2 *Met.*, 542.)—*Divins vs. Helaley* 78

2. See the opinion for a particular statement of the evidence, in support of the defense *supra*, held not sufficient to sustain it, or discharge the surety.—*Id.* 78

3. A surety, who pays a debt, is entitled to stand in the place of the creditor as to all liens and equities to which he has a right to look as a security for the payment of his debt. This general equitable principle is well settled.—*Havens vs. Foudry*...247

Treaties—Weights and Measures.

4. In such case it must be shown that, at the time the surety paid the debt, the creditor had a valid and subsisting lien or equity such as a court of equity would have enforced at his instance for the satisfaction of his debt.—*Ib.*.....247
5. A creditor is allowed to be substituted to any securities provided by the principal debtor for the indemnity of his sureties. But, as the equity is derived through the sureties, and as a consequence of their liability for the debt, whatever act or omission of the creditor may operate to discharge or release them from liability has the effect to destroy his equity. (10 *Leigh*, 206; *Ib.*, 387.)—*Ib.*.....247
6. Where a judgment against the principal debtor and his sureties is replevied by him with other sureties—the defendants in the judgments, who are only sureties for the debt, refusing to join in the bond—the latter are released from liability. The execution of the replevin bond in such cases merges the judgment, and releases the original sureties. (1 *B. Mon.*, 303; 1 *Met.*, 252.)—*Ib.*.....247
7. Where, in such case, the original sureties, thus released from liability, were indemnified by mortgage against loss, the sureties in the replevin bond who pay the debt, have no equity, as against other lien holders, under such mortgage.—*Ib.*.....247

TREATIES—

1. Treaties take effect, as to the governments making them, from the date of their execution, unless they contain stipulations to the contrary. But in regard to individual rights the rule is that the ratification of the treaty must be deemed its date.—*Yeaker vs. Yeaker*..... 33
2. See the opinion as to the scope, construction and effect of certain treaty stipulations between the United States and the Swiss Confederation in relation to the question of the right of citizens of Switzerland to acquire or hold by devise or descent an interest in real estate or its proceeds in Kentucky.—*Ib.*..... 34
- See *Constitutional Law*.

USAGE—

1. There is a strong and increasing disinclination of the courts to allow the general laws of the country to be varied by proof of local usages. Such an usage is binding only on the ground that the party, sought to be charged, contracted with reference to it. It must appear that he had actual knowledge of it, or the evidence must be such as to clearly authorise the presumption that he had knowledge of it.—*Caldwell, &c. vs. Dawson*.....121
2. To make such a custom admissible it must be of such age, such uniformity of observance, such certainty and fixedness of character, and of such notoriety, that a jury would feel clear in saying that it was known to the party sought to be affected by it. (1 *Met.*, 562.)—*Ib.*..... 121
3. The fact that one party had knowledge of the usage, and supposed it would enter into the contract, is not sufficient, nor can it enter into the contract, though both parties had knowledge of it, if it appears they did not contract with reference to it.—*Ib.*.....121

VENDOR AND PURCHASER—

See *Notice. Contracts. Conveyances.*

WEIGHTS AND MEASURES—

1. Congress has not passed a law to fix the standard of weights and measures as it is authorised to do by the Constitution. The laws of the State must, therefore, govern the subject. See acts of the General Assembly adopting the standards fur-

Witness—Wills.

nished by the Secretary of the Treasury under a resolution of Congress. (*Act of 1839, 3 Stat. Law, 583; Revised Statutes, chap. 106, sec. 1.*)—*Caldwell, &c. vs. Dawson*.....121

2. According to the standard *supra*, a bushel is a measure containing 77.6274 pounds avoirdupois of distilled water at the temperature of the maximum density of water and barometer 30 inches at 62° Fahrenheit. (*Homan's Cyclopaedia of Commerce, page, 1943.*) This is the same as the Winchester bushel, and contains 2150.42 cubic inches.—*Ib*.....121

3. Where a contract for the sale of charcoal, by the bushel, designated the place at which it was to be made, which the seller was to deliver at the furnace of the purchaser, the place of measurement is at the place of delivery; and the delivery being by wagon the mode of ascertaining the quantity should be by gauging the contents of the wagon at the place of delivery, unless another mode was provided by contract, or established by usage.—*Ib*.....121

WITNESS—

That a witness is liable to judgment for costs in the action is a disqualifying interest.—*Dougherty vs. Smith, &c.*.....279

WILLS—

1. "As I intend starting in a few days to the State of Missouri, and should anything happen that I should not return alive, my wish is, that all of my land," &c., [going on to devise an estate.] The author of the paper made the contemplated trip, returned to Kentucky and died. *Held*, That the instrument is contingent and inoperative as a will.—*Dougherty vs. Dougherty*..... 25

2. See opinion for the subsequent acts, parol and written declarations of the decedent, held not sufficient to establish a re-execution or re-publication of the instrument as a will.—*Ib*..... 25

3. *Quere*. Can a contingent will, after the happening of the event which was to terminate its effect, be revived by any kind of a re-execution which would give it the force of a will?—*Ib* 25

4. The case of Maxwell's will, (3 *Met.*, 101.) cited and approved.—*Ib*..... 25

5. After a testator's name had been subscribed to the writing, he acknowledged it to be his will in the presence of two witnesses, who subscribed as such. The testator then made his mark to it between his christian and surname. *Held*, to be a sufficient publication of the instrument as a will—the placing of the mark to it was unnecessary.—*Schreest vs. Edwards*.....163

6. It is not material whether the names of the attesting witnesses, or that of the testator, be first subscribed, if the witnesses were present when the testator either wrote his name or acknowledged it as his signature, and, being called on for that purpose, actually witnessed or attested that fact. (1 *B. Mon.*, 114.)—*Ib*.....163

7. The provision in regard to the attestation of wills in the statute of 1797 concerning wills, is the same in import and substance as the 5th section of chapter 106 of the *Revised Statutes*, (2 *vol.*, 458.)—*Ib*.....163

8. The execution of an instrument as a will by the testator, with the requisite solemnities, is presumptive evidence that he knew its contents and that it conforms to his intentions; and it is incumbent on those who seek to avoid it on the ground that it makes a disposition of his estate of which he at the time was not fully apprised, or had no knowledge, to establish the fact *aliunde*. (3 *A. K. Mar.*, 144; 1 *Jarman on Wills.*)—*Ib*.....163

Wills.

9. A testator, who was illiterate and could not read, furnished the draftsman with a previous will which he had made, and directed him to write his will like that omitting the lands, as they had been deeded. The draftsman did so; and, as he would write a clause or paragraph, he would read it to the testator, who would approve what was written. In that way the whole instrument was read to and approved by him. *Held* sufficient to show that the testator knew the contents of the instrument.—*Ib.*.....163

10. Upon an appeal from an order admitting a will to record or rejecting it, to the circuit court and thence to the court of appeals, the latter is made the trier of the facts certified from the circuit court, without reference to and wholly independent of the finding of the jury; and, by applying the law to the facts, of which the court is made the sole trier, it determines whether the testamentary paper should be admitted to probate or rejected. The circuit court can only enter the mandate, with directions to the county court to make such orders as may be proper and necessary to carry out the judgment of this court. (*Rev. Statutes, chap. 106, sec. 28; 18 B. Mon., 61.*)—*Ib.*.....163

11. Though subscribing witness to a will prove that, at the time the instrument was published, the testator was not of sound mind, his capacity may be established by other sufficient evidence. (*5 Mon., 199; 2 B. Mon., 79.*)—*Ib.*.....164

12. See the opinion for a particular statement of the evidence as to the mental capacity of the testator to make a will; from which, (to some extent conflicting,) it is *held* that, although the mental capacity of the testator was to some extent impaired by old age and physical infirmities, the facts decidedly preponderate in favor of his testamentary capacity at the time of the publication of the instrument, which is established as his will—there being no sufficient evidence of the existence or exercise of an unlawful influence over the testator to procure its execution. And refer to 2 *J. J. Mar., 331; Ib., 340; 2 B. Mon., 74; Ib., 79; 1 Jarman on Wills, 53, 54.*—*Ib.*.....164

13. A testator, in 1848, devised to his wife all his estate, real, personal and mixed; in 1853 and 1854 he acquired real estate, and died in 1861. The will gave no direction about the payment of debts. The widow became administratrix, and sought to have the after acquired real estate, which descended to the heirs at law, appropriated to the payment of the testator's debts, and exonerate the personal estate and slaves, which were ample to pay them. *Held*, That the real estate could not be thus subjected, in the absence of a clear intention, either express or implied, of the testator to exonerate the personal estate and slaves. (*3 Rawle, Penn. Rep., 236; 6 Mass., 150.*)—*Broadwell vs. Broadwell*.....290

14. The laws in existence at the time the Revised Statutes went into effect govern wills previously made.—*Ib.*.....290

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